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The Supreme Court of South Carolina has at last rendered a decision declaring unconstitutional the so-called Dispensary law of that State, under which it has been exercising a monopoly of the liquor traffic. The act provides for the appointment of a commissioner who shall purchase all intoxicating liquors for lawful sale in that case giving preference to manufacturers and brewers doing business in the State and furnish the same in sealed packages to certain officers to be appointed and known as "county dispersers" who shall sell by the package only, the purchaser not being allowed to open a package on the premises. The majority of the court now hold, in the first place, that it is not possible to regard the Dispensary act as a law prohibiting the sale of intoxicating liquors, because, on the contrary, it not only permits but encourages such sale to an unlimited extent, for its profit feature induces the tax payer to encourage as large sales as possible, and thereby lessen the burdens of the tax payers. In the second place, the court holds that in no view of the case can the act be regarded as a police regulation, and that, even if it could be regarded as such, police power does not include power on the part of the State to engage in carrying on such business. The court holds that the legislative department under the general power of taxation conferred upon it cannot impose any tax except for some public purpose, and that upon the same principle any act of the legislature which is designed to embark the State in any trade which involves the purchase and sale of any article of commerce for profit is outside of and altogether beyond the legislative power conferred upon the general assembly by the constitution. The court which consists of three judges stood two against and one for the constitutionality of the law. It is of interest to note that the conclusion of the court is opposed to that of the United States Circuit Court for South Carolina which, last year, in the case of Cantini v. Williams, upheld the constitutionality of the statute.

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The Supreme Court of the United States in the case of Sarlitz v. United States, lately passed upon the legal status of lager beer holding that it is not a spirituous liquor. The appellant was indicted in the District Court of the United States for the Western District of Arkansas, in May, 1892, for taking lager beer into the Choctaw Nation, Indian Territory, in violation of section 2139 of the Revised Statutes, which forbids the introduction of "spirituous liquors or wine." The court below refused to instruct the jury that lager beer was not "spirituous liquors or wine" within the meaning of these terms of the statute, and the appellant was convicted and was fined $250 and sentenced to imprisonment for three months. This judgment was reversed by the Supreme Court, Justice Shiras saying that "as far as popular usage goes, lager beer as a malt liquor, made by fermentation, is not included in the term spirituous liquors, the result of distillation, and that the terms for the statutes and decisions referred to 'plainly distinguished malt liquors, the result of fermentation, from spirituous liquors, the result of distillation.' * * * If, then, lager beer is not reasonable within the terms of the statute as a spirituous liquor, can it be said to be included in the term wines? Tacitus does, indeed, in his account of the customs of the ancient Germans, speak of their using a liquor made from barley: '*Corruptus in quendam similitudenem vini*'—'fermented into a kind of resemblance to wine.' This passage is one of the earliest references we have to malt liquor. That it was potent we learn from the same author, who tells us that the German warriors would deliberate upon and form their designs when sober, and then get drunk, presumably on this barley wine, and carry their projects into effect. But if beer is like wine, in its appearance and effects, it is plainly not wine either in its popular or technical meaning."

NOTES OF RECENT DECISIONS.

ACCIDENT INSURANCE — "EXTERNAL, VIOLENT AND ACCIDENTAL MEANS."—The Kentucky Court of Appeals in American Accident Co. v. Reigart, decide an interesting question in the law applicable to accident insurance. It is held that a policy of insu-

rance against injury or death, through external, violent and accidental means, should be liberally construed in favor of the insured, so as to carry out the intention of both parties to it; and when the language of the policy is susceptible of two interpretations, that which will sustain and cover the loss must be adopted. Where the policy provides that the liability shall arise when the death or injury "is external, violent and accidental means," it was not intended to cover only injuries resulting from external force or violence. The language requires that the means through which the accident occurred should be external. Therefore the liability arises when the death of the insured resulted from the accidental lodgment of a piece of beefsteak in his windpipe when he was attempting to swallow it. Such accident is the result of violent means when it results from unnatural as distinguished from natural causes. Pryor, J., says:

The appellee, Julia J. Reigart, the widow of Thomas I. Reigart, instituted this action in the Mason Circuit Court to recover $5,000 upon an accident policy issued by the American Accident Co., of Louisville, Ky., to said Reigart, and made payable to his wife if she survived him. Her husband lost his life by eating a piece of beefsteak, that, in the attempt to swallow it, accidentally passed into his windpipe, choking him to death in a few moments. By the terms of the policy the insurance was made payable for injury or death received through external, violent and accidental means. That the death of the insured was accidental is conceded, but it is contended that the contract of insurance only embraces accidental injury, caused by external violence or accidents, brought about by means externally violent. It is argued that the act of chewing or eating food is natural and harmless, and if in eating, a part of the food passes into the windpipe, causing death, it cannot be said that death was produced by means of external violence or force. In other words, that the plain meaning of the language of the policy, "through external, violent and accidental means," is that the accident causing death must have been caused by an external force. The court below said, in effect, to the jury, placing a different construction on the contract, if the death was accidental, and caused by the passing of the steak into the windpipe, they should find for the plaintiff. The rule laid down by Mr. May, in his work on Insurance (3d ed.), section 175, is as follows: "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain and cover the loss must in preference be adopted;" and we might add that no construction should be placed upon such contracts as would defeat the intention of both parties, as it is manifest, if the interpretation given the language of this policy by counsel for the defense is adopted, it would defeat the intention of both the contracting parties. The doctrine of this court, as announced in Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, where the authorities were reviewed on the question there presented, recognizes fully this rule of construction, and that regard must be had to the purpose sought to be accomplished by both the parties. This appellant is an accident insurance company, and its policies are termed accidental policies, and the very object of insuring in such companies is to obtain indemnity where an injury or death results from accident. While the policy provides that the liability arises where the injury "is through external, violent and accidental means, independent of all other causes," it was not designed that there should be such external violence as a fall, a kick or a blow on the flesh as would cause death or an injury before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases, resulting in injury, where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes, and that were liable to occur at any time from natural causes. If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion, or to completely stay the operations of nature in such a manner as to produce disease, no one would contend that the pain or the disease was the result of accident, or that the terms of this policy embraced such a case; but where the substance causing the death is visible, and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine. There is no external force or violence from the poison, and the injury internal in its character, and yet the authorities hold that the insurance company is liable in such a case. Healy v. Mutual Accident Co., 133 Ill. 556. It is plain, we think, that the means, or that which caused the injury, should be external, and not that the injury should have been external. It is said, however, that if the injury is not to be external, that the death must have resulted from "violent and accidental means." It is universally understood, when it is said "that one died a violent death," that it was unnatural—a death not occurring in the ordinary way—and in fact the definition of the word "violent" is unnatural, and in using this word the insurance company was attempting to prevent the insured from asserting a claim where the injury or death was the result of some natural cause. In the case of Paul v. Travelers' Ins. Co., 112 N. Y. 472, on a similar policy, it was held "that a death unnatural, the result of accident, imports an external and violent agency as the cause." This same view was taken by the Illinois Supreme Court in the case of Healy v. Mutual Accident Association, already cited. A similar construction to the verbiage of like policies has been heretofore given by courts of last resort, and if companies organized as this is intended that actual external force, causing the accident, must be shown before recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning. The instructions below were proper, and in our opinion the widow is entitled to recover.

BANKS AND BANKING—CHECK AS AN EQUITABLE ASSIGNMENT.—The question when and under what circumstances, the death or insolvency of the drawer of a check has the legal effect to countermand its payment when the check is to be regarded as an equitable assignment of the fund—has given rise to a great deal of discussion and to some differences of opinion. The question has been recently considered by the Supreme Court of Appeals of West Virginia in Hulings v. Hulings Lumber Co., it being there decided that a check operates as an equitable assignment *pro tanto* from the time it is drawn and delivered, as between the drawer and the payee or holder, and that a general assignment for the benefit of creditors does not defeat the check holder, although the check be not presented to the bank for payment until after such assignment. Holt, J., says:

It was in this case, an order to the cashier of the bank to transfer the deposit *pro tanto* of the lumber company to the account of Kenneweg & Co., in discharge of the note of the drawer, then there for collection. If the cashier or bank was the agent of the lumber company to pay, it was also the agent of Kenneweg to collect; and although the letter containing the check and instructions also contained, perhaps, the information as to the making of the trust deed, the check having come into the hands of Kenneweg's agent to collect, it may be regarded as issued, and, as between the lumber company and Kenneweg, operated as an equitable assignment of that amount. The bank did not and does not itself claim it, and no one impeaches it as fraudulent and voidable. The bank continued to hold the check, money and note, until the controversy as to the money virtually in court between Kenneweg and the trustee should be settled; so that it is a question of ownership, depending on equities, and not what the stakeholder could do. The letter is not produced. Mr. Shriver, the cashier, testifies, but is not examined on this point. It is probable that the letter spoke of the general assignment for payment of debt, and of the preference given the bank for its debt of $20,000 and the fact of insolvency, if it then existed, was not a fact communicated, but only inferred, for the officer who sent the check says in his testimony that the lumber company was not then insolvent. Although the trust deed was afterwards acknowledged, and delivered on the same day, no express mention is made of this deposit, and it did not operate *proprio vigore* as a revocation of the check. As a matter of honesty and fair dealing under the common usage in such matters, it is generally regarded as a fraud on the part of the drawer of the check, in payment of his debt, to countermand it without some good cause, and such fraud should not be encouraged by the law's approval. (2) As a matter of public policy and general convenience, the law's approval of the unlimited right of revocation would tend to weaken confidence in checks as money, and impair the usefulness of banks as places of deposit for convenient paying, as well as for safekeeping. (3) Regarded as an equitable assignment, it has all the elements of a contract of sale or transfer of negotiable paper, without inconvenience to the bank, or undue restraint upon the proper power of revocation. (4) So much for principle pointing to the proper rule. And, as matter of authority, so long ago as 1835, in the case of Brooks v. Hatch (6 Leigh, 534), such check or order was held to be an equitable assignment *pro tanto* of the fund thereafter to come into the hands of the drawee; citing Row v. Dawson (1 Ves. Sr. 331); Peyton v. Hallett (1 Caines, 363); and Cutts v. Perkins (12 Mass. 206). In the case of Clayton v. Fawcett (2 Leigh, 19), the letter of Fawcett would have been adjudged an equitable assignment but for the condition contained in it that the payment was to depend on the drawer's being absent; citing on the subject of equitable assignment Duke of Chandos v. Talbot (2 P. Wms. 608); Theobalds v. Duffoy (9 Mod. 102), and Bates v. Dandy (2 Atk. 207). In Anderson v. De Soer (6 Grat. 363), the same doctrine is laid down; and in Bank v. Kimberlands (16 W. Va. 555, 558), and Bell v. Alexander (21 Grat. 1, 6). Upon the subject of a check duly issued operating as equitable asignment, see 2 Daniel, Neg. Inst. (4th Ed.), § 1618*b*, note; *Id.* § 1635, *et seq.*; Pease v. Landauer, 63 Wis. 20; Stoller v. Coates, 88 Mo. 514; Roberts v. Corbin, 26 Iowa, 327; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212, and see cases cited; Sav. Inst. v. Adae, 8 Fed. Rep. 106; Bank v. Coates, *Id.* 540; Row v. Dawson and Ryall v. Rowles, 2 White & T. Lead. Cas. (4th Amer. from 4th Eng. Ed.), 1531, 1533; Grant Banks, side pp. 50, 51, citing Tate v. Hilbert (1793), 2 Ves. Jr. 111; Rev. Rep. 175, referring to Rolls v. Pearce (5 Ch. Div. 730), a case of *donatio mortis causa*. On same subject, see Austin v. Mead (Brett. Lead. Cas. Eq. 122, 15 Ch. Div. 651), and Burke v. Bishop (27 La. Ann. 465), treating the check as a mandate. On nature of a check, see 2 Daniel Neg. Inst., ch. 49, § 1566; *et. seq.*; Bolles, Banks, § 58, *et. seq.*; Bullard v. Randall (1 Gray, 606). On nature of bank contracts and duty to pay checks, see Bolles, Banks, §§ 32, 80, *et seq.*; 2 Morse, Banks (3d Ed., by Parsons), ch. 36, § 565, *et seq.* On revocation of checks, see 1 Morse, Banks, ch. 28, § 397, *et seq.*; revocation by death, section 480; by insolvency, section 400*a*. On assignment in Equity, see 1 Beach, Mod. Eq. Jur. 326; 2 Story (13th Ed.), § 1044. On the French law on the general subject, see note 2 to section 1040*a*. On the subject of handing a key, etc., so as to enable buyer or donee to take possession, see 2 Schouler, Pers. Prop. § 67. On equitable assignment, see *Id.* §§ 76, 75; Elam v. Keen (4 Leigh, 333); 1 Schouler, §§ 74, 77, *et seq.* This is not a case of a suit at law against the bank, but in equity, where the court has the fund under its control and all the parties before it, including the stakeholder; and I do not understand any decisions of the Supreme Court of the United States as not treating it as a good, equitable assignment, as between the payee and trustee. Certainly such is the settled rule of law in this case.

RAILROAD COMPANY — FIRES — CONSTITUTIONAL LAW—NELIGENCE.—In Campbell v. Missouri Pac. Ry. Co., 25 S. W. Rep. 936, the Supreme Court of Missouri decided some interesting questions of law in relation to fires set by locomotives. It was held that Rev. St. 1889, § 2615, making railroad companies liable for fires set by their locomotives, without proof of negligence, is constitutional. The fact that the petition needlessly avers negligence does not prevent a recovery un-

der the statute (Rev. St. 1889, § 2615), without proof of negligence. Where the connection between the fire and the engine is denied, and is only provable by circumstantial evidence, and it is not pretended that the particular engine was better made or manned than other of defendant's, evidence of fires set by engines, before and after the fire in question, at different places along the line, is competent to show possibility and probability of plaintiff's theory. Rev. St. 1889, § 2615, making the company responsible to every person whose property may be injured or destroyed, and giving it an insurable interest in property along its route, does not exempt it from liability for personalty, and shrubs, trees and flowers, on which it cannot get insurance. Sherwood, J., dissented. The court says:

1. The first proposition insisted upon as ground for reversal of the judgment is that said section 2615, which makes every person and corporation responsible in damages for property injured or damaged by fire communicated, directly or indirectly, by locomotive engines in use upon their railroads, without proof of negligence, is unconstitutional. This objection has received the careful consideration of this court *in banc* at this term in the case of Mathews v. Railway Co., 24 S. W. Rep. 591, in which the statute in question was held valid. The objection under the authority of that case must therefore be overruled. It may not be out of place here to take the occasion of stating that, in my opinion, the statute can be sustained on the broad ground that it is merely remedial in its character, and is authorized under the general powers of the legislature to provide appropriate remedies for the redress of such wrongs as are contemplated. "The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective, remedy." End. Interp. St. § 285. It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things: The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal, at least, to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss,—the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that "every one should so use his own property as not to injure that of his neighbor." Prior to the statute under consideration, the loss was made to fall upon the owner who was innocent of fault in the use and care of his own property, and had no part in setting at liberty the destructive agency. The rule was manifestly unjust. To change this rule, and place the liability where it should rest, is the purpose of the statute. In the language of Dewey, J., in Lyman v. Railway Co., 4 Cush. 290, we consider the statute "as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the locomotive engine. The right to use the parcel of land appropriated to the railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may justify." The statute considered in that case imposed on the railroad company absolute liability for damages caused by fires escaping from engines. So, in a recent case in Connecticut, the court, in discussing a similar statute says: "In this view of the case, the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a 'remedial statute,' in the best sense, and we must so construe it as to suppress the mischief and advance the remedy." Martin v. Railroad Co., 62 Conn. 340, 25 Atl. Rep. 239. The contract between the State and the corporation is that the latter may propel its trains by the use of steam generated by fire. There was no agreement that it should be exempt from liability for the consequences resulting to others from its use of fire. In respect to such consequences it is subject to control by remedial laws to the same extent as natural persons. Fire, when uncontrolled, is necessarily destructive of property. As shown in the opinion of Gantt, J., in the Mathews case, *supra*, damage caused by fire was recoverable at common law without proof of negligence. There is no reason why the common law could not, or indeed should not, be restored in cases in which the lawful use of property by one necessarily exposes the property of others to damage by fire. A statute of this State declared that "if any person shall willfully set on fire any woods, marshes or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action on the case." Rev. St. 1845, p. 1091, § 3. This act came before this court in 1848, and its validity was not questioned, though that distinguished jurist, Leonard, afterwards judge of this court, represented the party charged with the damage, and a recovery without proof of negligence was affirmed. In that case the court held that the fact that the fire was set on defendant's land constituted no defense under the statute. Finley v. Langston, 12 Mo. 123. A similar statute was held valid by the Supreme Court of Iowa. Conn v. May, 36 Iowa, 241. We think there can be no doubt that the State has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive, and in the use of which absolute control is impossible, whether the one using the agency be a private person or a corporation.

2. The petition charged that the fire causing the injury was permitted to escape through the negligence of the defendant, and the court permitted a recovery under the statute without proof of negligence. Defendant assigns this action of the court as error, in that it permitted a recovery upon a cause of action

different from that charged in the petition. The petition states all the facts necessary to authorize a judgment under the provisions of the statute, and, in addition thereto, the allegation of negligence. By the statement of more than was required, plaintiff did not forfeit his right to recover upon proof of the facts he was required to state, and did state, in his petition. Radcliffe v. Railway Co., 90 Mo. 131, 2 S. W. Rep 277; Morrow v. Surber, 97 Mo. 155, 11 S. W. Rep. 48.

3. During the trial, witnesses were permitted to testify, over the objection of defendant, that other fires, both before and subsequent to the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's engines. The admission of this evidence is assigned as error. In Coale v. Railway Co., 60 Mo. 227, this court held that, in order to prove that one engine was insufficient, or that the employees of the company in charge of such engine were careless or incompetent, evidence was not admissible to prove that other engines were defective, and other employees were incompetent or negligent. The ruling in that case is not controlling on the question of the admissibility of the evidence complained of here, for the reason that the statute creates an absolute liability, without respect to the character of the machinery or the competency of the employees. The admission of the evidence was clearly harmless if it only tended to prove want of care on the part of defendant. The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property, directly or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial whether the fire causing the damage did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine from which alone the fire could have been communicated was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in Sheldon v. Railroad Co., 14 N. Y. 223, by a divided court. The court in that case says: "The competency of this evidence has been directly decided in the English Court of Common Pleas. Piggot v. Railway Co., 10 Jur. 571; Aldridge v. Railway Co., 3 Man. & G. 515. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders, which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury." This ruling was followed without division in Field v. Railway Co., 32 N. Y. 339, and Webb v. Railway Co., 49 N. Y. 421. A similar ruling was made by the Supreme Court of the United States in Railroad Co. v. Richardson, 91 U. S. 470. Mr. Justice Strong, who wrote the obinion of he court, says: "The question has often been considered by the courts of this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire." He follows this statement of the law by a number of citations, both English and American, including the case of Sheldon v. Railroad Co., *supra*. Further on in the same opinion the judge says: "The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that somes engines of the same defendant, at other times during the same season, had scattered fire along their passage." To the same effect are the following cases: Smith v. Railroad Co., 63 N. H. 25; Railroad Co. v. Gilbert, 3 C. C. A. 264, 52 Fed. Rep. 711; Thatcher v. Railroad Co., 85 Me. 509, 27 Atl. Rep. 519. We think the evidence tended to prove the possibility, and consequent probability that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible, and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court. Coale v. Railway Co., *supra*; Patton v. Railway Co., 87 Mo. 117. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue.

4. Defendant insists, further, that plaintiff was not entitled to recover under the statute for personal property burned, nor for shrubs, trees, and flowers, upon which defendant could not obtain insurance. For support of this contention, counsel cite Chapman v. Railroad Co., 37 Me. 92. The loss considered in that case was of a lot of cedar posts temporarily deposited near the road. The statute made the railroad responsible "when a building or other property is injured by the fire communicated by a locomotive engine," and gave to the corporation "an insurable interest in the property along the route for which it is responsible." After discussing the statute, the court says: "The conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to property permanently existing along the route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporatian is to be determined by principles of the common law." In Pratt v. Railroad Co., 42 Me. 479, the same court held that the liability of the company under this statute was not confined to real estate, but extended to personal property as well. Exemption from responsibility under the statute of that State has never extended beyond injury to movable property temporarily placed near the track. In the recent case of Thatcher v. Railroad Co., *supra*, the Supreme Court of that State very evidently disapproves the decision in the Chapman Case, though it expressly states that it had no intention of overruling it. The court agreed that a different construction of the statute had been given by the courts of Massachusetts, Vermont, and

New Hampshire from the one declared in the Chap man Case. We do not think so narrow a construction should be given our statute. It is remedial, and such construction should be given it as will advance the remedy. Indeed, the language of the statute is so plain and unambiguous as to admit of but one construction. The corporation shall be responsible "to every person or corporation whose property may be injured or destroyed."

ONE INSTANCE WHERE THE PLEA OF RES ADJUDICATA IS INOPERATIVE AS A TECHNICAL ESTOPPEL.

Is an individual who is interested in the subject-matter of a suit in more than one capacity, as in an official or representative capacity and also in his own personal capacity, and who is made a party defendant and summoned in one capacity only, estopped to deny the conclusiveness of the judgment upon him in his other capacities? We take the ground that he is not, whether he is summoned generally, without any particular mention of the interest he claims in the subject-matter of the suit, except in the allegations of the bill or declaration, or whether he is summoned in his official or representative capacity only. The position is not undisputed, especially where the party is summoned generally, but a careful review of the many authorities shows, we think, the weight of authority to support our contention, whether this question comes up on a general summons or a summons in a particular capacity only.

The most recent decision that has come under the writer's observation, in conflict with the proposition laid down, is that handed down July 14, 1890, by Judge Blodgett in the United States Circuit Court for the Northern District of Illinois, in the case of John E. Cornell v. Mrs. Hetty H. R. Green, reported in 43 Fed. Rep. 105. This decision was of more than usual local interest on account of the value of the property involved, a tract of land in the fashionable residence district of Chicago, said to be worth some three millions of dollars, and it is of interest from a legal point of view because, so far as the writer can find, it stands alone in holding that a person shown by the record to have been summoned in his representative capacity only, can be affected in his rights individually by a mere recital in the bill that he has or claims individual interests. The case arose out of a mortgage foreclosure suit entitled Green v. Gage, instituted in 1875 by Mrs. Green against the widow, six children and three guardians of the two minor children of one George W. Gage, the original owner of the property, who had, in his life time, in 1871 and 1873, executed trust deeds on the property to secure the payment of certain notes. In 1874, Gage deeded these lands in fee-simple to Wm. F. Tucker. In 1875 Gage died, and later in the same year Mrs. Green, having become the owner and holder of the notes secured by the trust deeds, instituted foreclosure proceedings. Her bill recited, among other things, the conveyance by Gage to Tucker of the property in litigation, in 1874, the record of the deed and the consideration for the conveyance, $24,000. In naming the parties defendant, Tucker was designated in the bill only as one of the guardians of the minor children of Gage and also as one of the executors of the last will and testament of Gage. Process was prayed upon the defendants in a certain order, naming Wm. F. Tucker in his representative capacities, but not individually. The marshal's return showed regular service in exact accordance with that prayer. Tucker made no appearance in the case and a default was entered against him. The decree did not show that a subpœna issued against him personally but merely recited that personal service was had upon him as defendant. In 1877 Tucker died, and in 1890 his heirs conveyed all their interest in the property to Cornell, who thereupon filed his bill to redeem in the United States Circuit Court at Chicago. The decision of Judge Blodgett was upon a general demurrer to this bill by the defendant, Mrs. Green, and was to the effect that the bill contained sufficient averments to put Tucker upon answer as to his individual interest in the subject-matter of the controversy, and that, having been served with process in his representative capacities of guardian and executor, Tucker was chargeable with notice of the entire contents of the bill so far as it affected him in his representative or individual capacity, * * * and was sufficiently made a party before the court to bind him in his individual capacity. The only cases cited by the court in support of this decision were those of Walton's Executor v. Herbert, 4 N.

J. Eq. 73, and Brasher v. Van Cortlandt, 2 Johns. Ch. 242. In both cases, a subpœna was issued against the defendants generally, without stating their official capacity or the character in which they were sued; in Walton's Ex'r v. Herbert, the bill was filed against James Herbert, surviving executor of James Herbert, deceased, the prayer was for process against James Herbert and the subpœna was general; in Brasher v. Van Cortlandt, the committee of a lunatic were summoned generally, while in Green v. Gage, the subpœna expressly stated in what capacities Tucker was summoned. Neither were cases similar to that at bar, and in Brasher v. Van Cortlandt, on the principles asserted in which case Judge Blodgett said he based his opinion, the decision against the committee of a lunatic was not on the ground that they were summoned generally, and therefore, should take notice of the allegations of the bill, but because they accepted a copy of the bill in which they were properly entitled and actually entered their appearance and knew that the subpœna was not filled out in accordance with the prayer in the process. "It is not to be tolerated," said the Chancellor, "that the party, after taking a copy of the bill on which the subpœna had issued and in which he was properly entitled and entering his appearance, without his addition as committee of a lunatic, shall lie by silently and suffer the complainants to go, unsuspectingly, step by step, down to a final decree, on the ground of a valid appearance, and then start up with the objection that he had never appeared in that suit." In Green v. Gage, the decree was a default decree. Tucker was not cited to appear in any capacity in which he had an interest which he had any reason to defend and, therefore, made no appearance. In Brasher v. Van Cortlandt, also, the interests of the committee was solely that of a committee. They had no personal interest, the bill being by a creditor to sell the lunatic's real estate for the payment of his debts. In Green v. Gage, the defendant, Tucker, was personally interested in the foreclosure proceedings. As the owner of the equity of redemption, the fee, he had an unquestionable right to his day in court, to an opportunity to be heard in respect to his rights of property before he could be deprived of them; as a subsequent grantee before default in the conditions of the mortgage, he had a right to set up some, if not all the defenses, if any there were, available to his grantor;[1] to show, if the state of facts warranted it, that the mortgage had been satisfied, or the mortgagor's liability released, or that for some other reason the suit could not be maintained.[2] He had a right to be cited to answer respecting the validity and extent of the mortgage lien; he had a direct interest in the account to be taken of what was due,[3] being vitally interested in the amount due on the mortgage;[4] he had a right to know whether he would be required to redeem,[5] and he was entitled to redeem the premises on payment of the amount, if any, thus ascertained to be due.[6] All these rights were denied him by the neglect to subpœna him as such owner of the equity of redemption, the law of Illinois, where the foreclosure proceedings were had, although not requiring a mortgagee to take notice of the record of a deed conveying the equity of redemption, or to search the records to see what new incumbrances have been placed on the property,[7] yet when actual notice is brought home to the mortgagee of such a deed (as in this case, where Mrs. Green in her bill recited the conveyance to Tucker and the record of his deed), it will protect the owner of the equity of redemption, it being held in Hopkins v. Rose Clare Lead Co.,[8] and Robbins v. Arnold,[9] that when a complainant takes a decree without making the necessary parties defendant when the necessity of their being made parties is disclosed to him, the decree will be reversed. In such a case, the subsequent grantee before default must be actually served with process or appear voluntarily before his equity of redemption can be foreclosed, mere knowledge of the foreclosure proceedings on his part not dispensing with the necessity of making him an actual party to the proceedings before he can be divested of his rights.[10]

[1] Fall v. Evans, 20 Ind. 210.
[2] Terrell v. Allison, 21 Wall. 292.
[3] Lane v. Erskine, 13 Ill. 501.
[4] Delaplaine v. Lewis, 19 Wis. 476.
[5] Jeneson v. Janeson,
[6] Lane v. Erkskine, 13 Ill. 501.
[7] Boone v. Clark, 129 Ill. 466.
[8] Hopkins v. Rose Clare Lead Co., 72 Ill. 373.
[9] Robbins v. Arnold, 11 Ill. App. 439.
[10] Bradley and Wife v. Snyder, 14 Ill. 263; Gage v. McGregor, 61 N. H. 47; Bates v. Reddick, 2 Clark (Iowa), 423; Hunt v. Rooney, 77 Wis. 263; Denny v.

Again, it is at least a reasonable proposition that a general interest may embrace a special or narrower interest, but the decision in Cornell v. Green would permit a special interest to embrace a general interest, or the smaller a larger interest. It was the first proposition that Chief Justice Elliott had in mind, no doubt, when in Craighead v. Dalton,[11] he held that because the complainant in the foreclosure suit did not call the appellant into court in any particular capacity or require him to answer as to any interest derived from any particular source, but called him into court to answer generally as to his interest in his own rights, he should have asserted such rights as he had, failing to do which, the penalty of his neglect would be a conclusive judgment, but the court denied the converse of this proposition and said: "There is a limited class of cases to which the rule on the subject of a former adjudication does not apply * * * cases in which a party is sued in a particular capacity, and he is held to be bound only in the capacity in which he was sued." In Trogden v. McNult,[12] the distinction is also made between a case where the interests of a defendant are alleged, directly or indirectly, in the bill and one where there are no such allegations. In the former case, the inference to be drawn from the language of the court is that if the defendant were summoned generally it would be necessary for him to assert all his rights. In the second case, "although a person may be named in the prayer of the bill and served with process, if the bill charges him in one capacity only when he may be interested in the subject-matter of the suit in more than one capacity, he cannot," said the court, "be concluded in any other capacity simply because he failed to assert his rights in such other capacity; any interests he may have which are neither directly nor indirectly alleged or referred to in the bill, will remain unaffected by the suit, whether the suit is decided upon bill taken for confessed or upon full answer by the defendants," citing other West Virginia decisions and a Virginia case.[13]

But the seeming importance attached by the court in Trogden v. McNult and Walton's Ex'r v. Herbert to the presence of allegations of interest in the bill does not seem well founded. If, as has been held,[14] it is insufficient to make a person a party to merely name him in the charging part or prayer of the bill or in the summons, if he is not actually served with process, on analogous principles, it would seem that a mere casual recital in the bill that one has or claims an interest in land is not sufficient to make him a party in his personal capacity where no summons in fact issues to him in that capacity. Such a recital in the bill, of interest, has been held of no importance by the courts of other States. In Landon v. Townshend,[15] the owner of the equity of redemption, who was also the assignee of a bankrupt, was made a party in his individual capacity only. As in Green v. Gage, the bill for foreclosure stated not only generally that the defendants had, or claimed to have, an interest in the mortgaged premises, but also, that since the execution of the mortgage, Waddell had become seized of the interest of said Scudder (mortgagor). Waddell made no appearance as assignee. The court said, "The judgment followed the prior proceedings and adjudged that the defendants be forever debarred and foreclosed of all right, title, interest or equity of redemption, and" (I follow the language of the court) "making no reference to his official character or title in the judgment." It was held that the foreclosure was ineffectual to bar the equity of redemption of Waddell as assignee in bankruptcy, he being before the court only in his individual capacity. In this case, clearly, Waddell's individual interest and his representative interest were treated as two distinct and separate interests, each requiring a summons. In Stockton Building & Loan Ass'n, appellant, v. George Chalmers *et al.*, Louisa M. Chalmers, respondent,[16] a defendant summoned in a mortgage foreclosure suit as executrix only, herself set up in her answer her individual interest in the premises (a homestead which she had declared upon a portion of the premises), and

Bennett, 128 U. S. 498; Kanne v. Minn. & St. L. Ry., 33 Minn. 419; Simson v. Hart, 14 Johns. Ch. 63; Freeman on Judgments, §§ 325-6.

[11] Craighead v. Dalton, 105 Ind. 72.

[12] Trogden v. McNult, 2 S. E. Rep. (W. Va.) 328, 29 W. Va.

[13] Chapman v. Pittsb. & S. W. Ry., 18 W. Va. 184; Renick v. Ludington, 20 W. Va. 536; Doonan v. Glynn, 28 W. Va. 715; Mosely v. Cocks, 7 Leigh (Va.), 224.

[14] Estill's Heirs v. Clay, 2 A. K. Marshall (Ky).

[15] Landon v. Townshend, 112 N. Y. 93.

[16] 75 Cal. 332.

the court found its existence as a fact and that it was subsequent in time and subject to the lien of the mortgage (and not an unextinguished dower interest, paramount to the lien of the mortgage), yet although equity is somewhat jealous in the protection of the mortgagee's rights, it was held that Mrs. Louisa M. Chalmers was never before the court individually. And the strongest reason to be found in the reports why a judgment only binds parties in the capacity in which they appear on the face of the record is to be found in this case. "It is well-settled," said Chief Justice Searles, "that a judgment for or against a party in one right cannot affect him when acting in another right," citing Blakely v. Newby,[17] and other authorities. "Louisa Chalmers was sued as the executrix of the last will of her deceased husband. As such, she could only avail herself of such defenses to the foreclosure suit as would have existed in favor of her testator had he been living and a party to the action, and had he been living and a party defendant, he could not have concluded by a defense, or a want thereof, his wife's right to the homestead. Such result could only be reached, if by action, in a proceeding to which she was a party," citing Stoops v. Woods,[18] and other California authorities. "It is true a party may be before the court in two or more capacities and in Corcoran v. Chesapeake Canal Co.,[19] an individual, as trustee for certain bondholders, was brought before the court and it was held the decree bound him as bondholder, because he represented himself, but Mrs. Chalmers as executrix, represented the estate of her husband * * * and as executrix, she could not represent it." To the complainant's claim that Mrs. Chalmers did, in effect, make herself, individually, a party to the action by setting up the homestead right when sued as executrix, the court replied that the Code specified but two methods by which, after commencement of an action, new parties may be brought in, one by order of the court and the other by complaint of intervention. "No such order was made or proceedings had in this case, hence we conclude she was not individually, a party to the cause. * * * We search the decree in vain for any adjudication of defendant's homestead rights." Confining ourselves exclusively to this phase of the law of estoppel presented in Cornell v. Green (the other larger question involved in the case, as to the control exercised by the whole record over the recitals in the decree as to due service of process, is worthy of an article in itself), let us examine the general principles involved in the question and see what is the general trend of the authorities on this subject.

To render a judgment or decree *res adjudicata*, the law requires identity, 1st, of the thing demanded or subject-matter; 2d, of the cause of demand or action, and third, one of the essential conditions under which the doctrine of *res adjudicata* becomes applicable is identity of the persons or parties in the character in which they are litigants, *i. e.*, in the quality in the persons for or against whom the claim is made,[20] and the general rule that a judgment of a court having jurisdiction of the subject-matter and the parties and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not complied with when the same person, though a party in both suits, is such in different capacities,[21] and does not stand in the same relation or character in the case at bar as in the former suit.[22] In such cases, the judgment estops the party only in the capacity in which he appeared in the suit in which it was rendered.[23] In the suit in which he is a party in another capacity, he is, in contemplation of law, a distinct person and a stranger to the prior proceedings and judgment.[24] Every person may, at different times, or at the same time, occupy different relations, act in different capacities and represent separate and perhaps, antagonistic interests. It is a rule of both the civil[25] and the common law,[26] that a party acting in one right can neither be benefited or injured by a judgment for or against him

[17] 6 Munford (Va.), 64; Freeman on Judgments, 156 and cases cited.

[18] 45 Cal. 439.

[19] 94 U. S. 741.

[20] Benz v. Hines, 3 Kas. 397; Wash. S. P. Co. v. Sickles, 24 Howard, 342; 1 Evans' Pothier on Obligations, 556.

[21] 1 Hermann on Estoppel, § 102; Bigelow on Estoppel, § 65.

[22] 1 Phillips on Evidence, 323.

[23] Duchess of Kingston's Case, 3 Smith's L. C. 2088.

[24] 2 Black on Judgments, § 536; Rathbone v. Hooney, 58 N. Y. 467; Jennings v. Jones, 2 Redfield (N. Y. Surr. R.), 95.

[25] Evans' Pothier on Obligations, 556.

[26] Robinson's Case, 3 Coke, 32.

when acting in some other right.[27] If he has rights or claims property in two or more capacities, and is made a defendant in some action or proceeding, the pleading against him should show that he is made defendant in each capacity,[28] and failing to do so, the judgment will often bind in one capacity only, though he might have been bound in both by appropriate pleadings.[29] If he is made a defendant in an official capacity, the judgment will not bind him personally, and if made a defendant personally, it will not bind him officially.[30] This rule is one of the fundamental principles of the jurisprudence of the subject; found in the Roman law and a familiar principle of the modern French and other continental systems.[31] The authorities, both English and American, are numerous and strong, and (with the exception of Cornell v. Green), unanimous in holding that where a person is made a party in an official capacity only, and is before the court as an administrator,[32] or as a guardian,[33] or as executor or executrix,[34] or as a trustee;[35] as a commissioner of highways,[36] or as heir,[37] the decree rendered does not affect the party's individual rights. As, a bill against one as administrator will not conclude him as a creditor;[38] a foreclosure against a widow as executrix,[39] or as heir,[40] will not conclude her as widow, nor, as we have seen, will it affect an interest acquired by her subsequent and subject to, the lien of a mortgage. Summoned as heir, the party will not be affected as vendor;[41] summoned in a foreclosure suit as the husband of a wife who gave a mortgage on property, the party is not concluded to show in a later action that he has individual rights, the property being community property and she giving the mortgage.[42] Nor, *e converso*, will a judgment for or against a person individually, bind him in an official capacity, as administrator of his wife;[43] as executor;[44] or trustee;[45] as guardian *ad litem*, though a false return calls him one;[46] as an assignee in bankruptcy;[47] or when he sues in some other right, as heir,[48] or in the right of another.[49] Nor, if he sues or is sued in one official capacity will it conclude him in another official capacity. A bill by one as administrator will not conclude him as executor.[50] A judgment against one individually will not protect him from a recovery against him as executor,[51] or as a guardian.[52] A judgment obtained by one suing as administrator by virtue of a statute giving a right of action, for the loss of one killed by the wrongful act, neglect or default of another, to the administrator, for the benefit of the wife, parent, husband or child, does not estop him from suing as administrator generally for injury to the decedent's personal estate and effects.[53] In the first instance, it is held that he sued as a trustee in respect of a different right altogether, on behalf of particular persons designated in the act. Parties before the courts as heirs of their father in respect to certain lands are

[27] Sinclair v. Jackson, 8 Cowan, 565; Brookings v. Dearmond, 27 Ga. 64.

[28] 1 Freeman on Judgments, § 156, citing Manigault v. Holmes, 1 Bailey (S. C.) Eq. 283.

[29] 1 Freeman on Judgments, § 156.

[30] 1 Freeman on Judgments, § 156.

[31] 2 Black on Judgments, § 536, citing Code Civil Art. 1351; Marcade Explication du Code Napoleon, t. 5, pp. 175-180.

[32] Jones v. Blake, 2 Hill (N. Y.), 629; Robinson's Case, 3 Coke, 32; Duchess of Kingston's Case, 3 Smith L. C. 2088; Leggett v. Grt. North. Ry., 1 Q. B. D. 599; Bradshaw v. Lancash. & Yorkshire Ry., L. R. 10 C. P. 189; Legge v. Edmonds, 25 L. J. Ch. 125; 1 Freeman on Judgments, 156.

[33] McBurnie v. Seaton, 111 Ind. 56; 1 Hermann on Estoppel, § 94; 2 Black on Judgments, 536.

[34] Stockton Bldg. & Loan Ass'n v. Chalmers, 75 Cal. 322; Van Colt v. Prentice, 104 N. Y. 57; Lewis v. Smith, 11 Barb. 156; Frost v. Koons, 30 N. Y. 428; Hall v. Richardson, 22 Hun (N. Y.), 444; Brookings v. Dearmond, 27 Ga. 58; 2 Black, Judgments, § 536; Dicey on Parties to Actions, 338-340.

[35] Duchess of Kingston's Case, 3 Sm. L. C. 2088; Jackson v. Mills, 13 Johns. Ch. (N. Y.) 462; 1 Hermann Estoppel, § 94.

[36] Gould v. Glass, 19 Barb. 179.

[37] Unfried v. Heberer, 63 Ind. 67; Armstrong v. Cavitt, 78 Ind. 476; Compton v. Pruitt, 88 Ind. 171; Lord v. Wilcox, 99 Ind. 491; Erwin v. Garner, 108 Ind. 488; Grice v. Randall, 23 Vt. 242.

[38] Jones v. Blake, 2 Hill (N. Y.), 629.

[39] Lewis v. Smith, 11 Barb. 156; Frost v. Koons, 30 N. Y. 428.

[40] Armstrong v. Cavitt, Unfried v. Heberer and Compton v. Pruitt, *supra*.

[41] Lord v. Wilcox, 99 Ind. 491.

[42] McComb v. Spangler, 71 Cal. 418.

[43] Blakey v. Newby, 6 Munford (Va.), 64; Lander v. Arno, 65 Me. 26.

[44] Davis v. Davis, 30 Ga. 299.

[45] Rathbone v. Hooney, 58 N Y. 467.

[46] Shaefer v. Gates, 2 B. Monroe, 457.

[47] Landon v. Townshend, 112 N. Y. 93.

[48] Jennings v. Jones, 2 Redfield's Surr. R. 95.

[49] Brookings v. Dearmond, 27 Ga. 58.

[50] Robinson's Case, 3 Coke, 32.

[51] Davis v. Davis, 30 Ga. 299.

[52] Havens v. Sherman, 42 Barb. 636.

[53] Leggett v. Grt. Northern Ry., 1 Q. B. D. 594; Bradshaw v. Lancash. & Yorkshire Ry., L. R. 10 C. P. 189.

not concluded in a later suit, as heirs of their mother, in respect to portions of the same land.[54] In Stoops v. Woods,[55] it was held that a judgment against a sheriff for taking goods of B, where he justified under an execution in favor of A, does not conclude the sheriff in a subsequent suit by the same plaintiff for taking the same goods, where the sheriff justified under an execution in favor of C. This interpretation of the doctrine of estoppel is applied not only in suits by or against one in one of two or more capacities, but to actions, declarations and admissions made in one capacity only. A declaration by one as *cestui que trust* does not bind when the same person is sued as administratrix;[56] one is not estopped individually by a deed he executed as attorney;[57] a covenant of warranty made by one as administrator does not estop his individual grantee from setting up title.[58] An agreement individually to surrender premises does not estop one to bring ejectment as administrator. What one does as administrator *de son tort* does not bind him as a lawful administrator.[59] One who mortgages premises individually is not estopped as administrator of his mother's estate to set up an assignment to her of a 99 years' lease.[60] An heir claiming as the heir of his father is not estopped by an estoppel upon him as heir of his mother.[61] The declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him.[62] Lord Chief Justice Abbott said, in this case, "what the assignees say in their own persons does not affect this case. You cannot confound plaintiffs of this sort with plaintiffs in their own character."

So of executors and administrators.[63] The assent of a son to the widow's taking possession of the intestate's property does not bind him when, later, he takes out administration. Such acts or declarations are only binding when for the benefit of the estate.[64] The whole law on this subject seems to the writer too well settled to be overthrown by a few scattering adverse decisions, and abundantly to support the position taken.

F. V. W. TIBBITS.

[54] Caruth v. Grigsby, 57 Texas, 266; Thompson v. Cragg, 24 Tex. 582; Erwin v. Garner, 108 Ind. 488.
[55] 45 Cal. 439.
[56] Legge v. Edmonds, 25 L. J. Ch. 125.
[57] Sinclair v. Jackson, 8 Cowan, 587.
[58] Jackson v. Hoffman, 9 Cowan, 273.
[59] Doe dem. Hornby v. Glenn, 1 Ad. & El. 49.
[60] Metters v. Brown, 1 Hurlst. & Coltman, 688; Morgan, Adm'r, v. Thomas, 8 Exch. 302.
[61] Comyns' Digest Estoppel C.
[62] Fenwick *et al.* v. Thornton, 1 Moody & M. 51.
[63] 3 Williams on Executors, 2007, 7th Ed.; 1 Wms. Ex. 472 note; Steward Adm'r v. Edmonds, overruling Whitehall v. Squires, 1 Salk. 295; Parsons v. Meyesden, 1 Freeman, 152.
[64] Morgan, Adm'r, v. Evans, 8 Exch. 302.

GUARANTY — CONSTRUCTION — DEPARTURE FROM TERMS.

CRANE CO. V. SPECHT.

Supreme Court of Nebraska, February, 6, 1894.

1. A contract of guaranty, entered into with one person or corporation, cannot be extended to another person or corporation.

2. A contract of guaranty will be strictly construed, and the guarantor held bound only according to the terms of the instrument containing his contract, and the terms of the contract will not be extended, by implication or otherwise, nor will evidence be received to vary its terms or meaning, when it is not, in any sense or portion, ambiguous or uncertain.

3. Where S guaranteed the account of L with the Crane Bros. Manuf'g Co., a corporation, for goods supplied and to be furnished by it to L, and the corporation afterwards changed its name to the Crane Co., and after the change, furnished goods to L, held, in an action by the Crane Co., on the guaranty, to recover the value of such goods, that S was not bound.

HARRISON, J.: In this case, an action in the district court of Douglass county, Neb., the plaintiff, the Crane Company, plaintiff in court below and in this court, sought to recover of defendant, Christian Specht, a certain sum of which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company.

The petition of plaintiff is as follows: "The plaintiff in the above-entitled cause, complaining of defendant therein, for a cause of action states: That said plaintiff is a corporation, duly organized under the laws of the State of Illinois. That on and prior to August 23, 1889, Crane Brothers Manufacturing Co. was a corporation, organized and doing business under the laws of the State of Illinois, and was engaged in the sale of plumbing and other materials in the City of Omaha, Nebraska. That, prior to said August 23, 1889, said Crane Bros. Manufacturing Co. had sold and furnished to one A. C. Lichtenberger goods and materials. That for said goods said Lichtenberger was indebted to said Crane Bros. Manufacturing Co., and, at said date, said Crane Bros. Manufacturing Co., refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods thereafter delivered, should be guarantied by some responsible party. That, in consideration of Crane Bros. Manufacturing Co. selling additional goods to said Lichtenberger,

said defendant, Christian Specht, executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Co., and the payment of all materials which said Lichtenberger should thereafter purchase of them. That, thereafter, said Crane Bros. Manufacturing Co., relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials. A copy of said guaranty is hereto attached, marked Exhibit A, and made a part of this petition. That, afterwards, the said plaintiff, became incorporated, and succeeded to the business and interests of said Crane Bros. Manufacturing Co., and continued to carry on said business, and to supply the customers of said Crane Bros. Manufacturing Co. That, relying upon said guaranty, made by said Christian Specht to said Crane Bros. Manufacturing Co., said plaintiff sold and furnished said Lichtenberger goods and materials. That said sales, made by plaintiff to said Lichtenberger, were made with the knowledge and consent of said defendant, and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger, under said guaranty to said Crane Bros. Manufacturing Co., and that said goods were furnished by said plaintiff, relying upon said guaranty, and at the request of said defendant that said goods should be so furnished. That a statement of said goods furnished by said Crane Bros. Manufacturing Co. and said plaintiff to said Lichtenberger, in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit B, and made a part hereof. That, on account of goods so furnished, there remains now due said plaintiff the sum of eight hundred eighty-one dollars and ninety-nine cents (881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore the plaintiff demands judgment against said defendant in the sum of one thousand dollars (1,000.00), and the costs of suit."

The defendant answers the petition as follows: "First. That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and, therefore, denies, the same. Second. The defendant, further answering, admits that the Crane Bros. Manufacturing Co. sold and furnished to the said A. C. Lichtenberger, on or about August 23, 1889, some goods and merchandise, and further admits that, on the 23d day of August, 1889, he executed the guaranty mentioned in the petition of which Exhibit A is a copy. Third. This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Co., and continued to carry on said business, and to supply the customers of said Crane Bros. Manufacturing Co., and cannot admit, and, therefore, denies, the same. Fourth. The defendant, further answering, denies that the plaintiff sold and furnished said Lichtenberger goods and materials, as alleged in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff, and at his request, and denies that the defendant requested the plaintiff to sell any goods, whatever, to said Lichtenberger or ever, in any manner whatsoever, agreed to become liable for the same, and denies that there is due the plaintiff the sum of $881 from said Litchenberger, or any part thereof. And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever. Wherefore the defendant, having fully answered said petition, prays to be hence dismissed, with his reasonable costs."

Exhibit A, the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

Exhibit A. Omaha, Neb., Aug. 23d, 1889. Mess. Crane Bros. Manufacturing Co., City—Gentlemen: I will guaranty the payment of your account against A. C. Litchenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me. Yours truly, C. Specht."

A jury was waived, and trial had to the court. There was a finding and judgment in favor of defendant, plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review. The evidence in the case discloses that, on the 23d day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question,—Exhibit A. That, on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company,—no change or alteration whatever being at this time made in the officers, management, business, or location of place of business—and, after such change, continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger, failed to pay. That defendant, Specht, was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty. That the action is brought upon the account, running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new name, for a balance due upon the account, which is due for goods sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions, and strenuously argued by counsel, is, can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contending that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of the same persons, managed by the same

officers, engaged in the same business, and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this, as well as other, contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to Crane Company.

The contention in the case resolves itself to the question, did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guarantied to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty, and the construction to be given to it. In Brandt on Suretyship and Guaranty (volume 1, 2d Ed. pp. 134, 135, § 93), it is said, in discussing such contracts: "A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances." Again it is said: "A surety, or guarantor, usually derives no benefit from his contract. His object, generally, is to befriend the principal. The guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms would be, not to enforce the contract made by him, but to make another for him." In Miller v. Stewart, 9 Wheat. 680, Story, J., says: "Nothing can be more clear, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be, even, for his benefit. He has a right to stand upon the very terms of his contract, and, if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass, now, to some of the cases in which these rules have been particularly applied to the facts, as developed in the cases, selecting such as are similar to the one under consideration, and more or less directly in point. In the case of Allison v. Rutledge, 5 Yerg. 193, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of some bacon, purchased by one Cooper, and was sued on the instrument by John & Joseph Allison, as guarantor, for $100, the price of the bacon. Catron, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action, by force of the guaranty? It is addressed, in the singular, to Mr. Allison. Rutledge undertook for the debt of Cooper, and is bound by the writing, and this only. The contract cannot be varied, or its meaning explained, without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant." In the case of Smith v. Montgomery, 3 Tex. 199, the defendant, Montgomery, wrote and forwarded a letter of credit as follows: "Colorado, Dec. 27th, 1839. Col. Smith & Pilgrim—Gentlemen: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid, as far as to the amount of ($3,000) three thousand dollars. And much oblige yours, with respect, James S. Montgomery." This letter was addressed on the back to Smith alone. It appears that Smith and Pilgrim had been partners in business, but, a very short time prior to the date of the letter, had dissolved the partnership. The letter, being addressed on the back to Smith alone, was delivered to him, and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods, to the amount of the guaranty. Mr. Justice Wheeler, in delivering the opinion of the court, says: "Upon consideration, we are all of the opinion that we should look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address, full and complete, and free from ambiguity we must take that as the certain criterion to determine its application, without regard to the discrepancy in the superscription. If the letter did not bear, upon its face, the proper address, resort might be had to the superscription, or, perhaps, to other extrinsic evidence, if necessary, to determine its direction and application. Bell v. Bruen, 1 How. 169. But, when the contract, upon its face, is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face

of the instrument. It is a well settled rule, applicable to this class of cases, that the liability of a surety or guarantor cannot be extended by implication or otherwise, beyond the actual terms of his engagement. It does not matter that a proposed alteration would be even for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable." In the case of Bank v. Kaufman, 93 N. Y. 273, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions, or acquire any advantage therefrom, unless he is expressly referred to, or necessarily embraced, in the description of the persons to whom the offer of guaranty is addressed." "Guarantor liable only to person to whom he makes the guaranty." Bank v. Diefendorf, 90 Ill. 396. "A guarantor's engagement does not make him answerable for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement." Walsh v. Baillie, 10 Johns. 179; Penoyer v. Watson, 16 Johns. 99. "Where a letter of credit is addressed to a particular firm, no one else can rely upon it as a guaranty." Taylor v. Wetmore, 10 Ohio, 491.

In Barns v. Barrow, 61 N. Y. 39,—it being a case in which, under a written contract of guaranty, made with a particular person, a partnership, of which that person was a member, sought to recover the value of goods furnished the person for whose debt or default the guarantor stood charged to answer,—it is said: "On the face of this contract, it is plain that no one could act upon it, excepting the persons named in it." And Burge on Suretyship (chapter 3) is cited, as follows: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time, than is expressed, or necessarily included, in it." And, further, it is stated: "In the Roman law the rule now under consideration assumes the form of a maxim, 'An agreement of guaranty, made with one person, cannot be extended to another person.' " To the same effect as the above cases is that of Taylor v. McClung, 2 Houst. (Del.) 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of Lee v. Hastings, 13 Neb. 508, 14 N. W. Rep. 476. The case most directly in point is that of Grant v. Naylor, 4 Cranch, 224. In this case John and Jeremiah Naylor brought an action against Daniel Grant on a letter, or contract of guaranty, which was addressed to John and Joseph Naylor. Chief Justice Marshall, in the opinion in the case, says: "That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimoney, originate in a general and wise policy, which this court cannot relax, so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. On examining the cases which have been cited at bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co. to either of which this letter might have been delivered. In such a case the letter is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than the courts have ever gone, where the writing is itself a contract, and where no pre-existing obligation bound the party to enter into it."

In the case at bar, the defendant, Specht, addressed the letter, or contract of guaranty sued upon, to the Crane Bros. Manufacturing Company and not to the Crane Company. At the time the contract was entered into there was no such corporation in existence to the Crane Company. The contract of guaranty made by Specht was not, in any manner, for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and, when not uncertain, indefinite, or ambiguous, will not be extended, in any particular, beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation, from Crane Bros. Manufacturing Company to Crane Company, was made, there was no notice given defendant that such change had been made. The change could not, and did not, pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which, under certain circumstances as to assignment, and, possibly, without, would be a different case, and raise another point or question. The instrument containing the guaranty was

plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second; and the introduction of the letter, showing as it does, the guaranty to the Crane Bros. Manufacturing company, was not competent to, and does not, support the action on the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that she Crane Company had the same officers, and was under the same management, engaged in the same business, and in the same location, as the Crane Bros. Manufacturing Company, or that it had the same stockholders, and merely changed its name, or, if received, that it would alter or affect, in any manner, the relations or rights of the parties to the action. At the time the goods were furnished to Lichtenberger, there was no Crane Bros. Manufacturing Company. It had ceased to exist, or had become, by change of name, the Crane Company, and Specht could rely upon the exact terms of his contract, and demand that his rights and liability be measured by the guaranty, as written, signed, and delivered by him, to be bound only for goods furnished to Lichtenberger by the Crane Bros. Manufacturing Company, as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right and is affirmed. The other judges concur.

NOTE.—The very nature of a guarantor's contract; like that of a surety, forbids that his liability should be extended beyond the express terms and clear import of his undertaking. His position is peculiar; for while his contract is supported by consideration it is usually a consideration moving to another, the credit given, because of his guaranty, to the party for whose undertaking he agrees to be bound. Ordinarily he has personally no interest in the transaction. There is therefore every reason why he should not be answerable, for the undertaking or obligation of another beyond the scope of his engagement, why the case must be brought strictly within the terms of the guaranty when reasonably interpreted before he will be bound. Implication has no place in the construction of such a contract. This principle has been illustrated in a multitude of cases. Among the most recent adjudications on the subject are found the following: Tolman v. Clements, 56 N. W. Rep. 1038; Tansy v. Peterson (Iowa), 55 N. W. Rep. 577; Barber v. Mackerell, 67 L. T. (N. S.) 108, 40 Weekly Rep. 618; Kepler v. Carter (Kan.), 30 Pac. Rep. 182; Woods v. Doherty, 153 Mass. 558. Compare Richter v. Frank, 41 Fed. Rep. 859; People v. Backus, 117 N. Y. 196, 22 N. E. Rep. 759.

Nor is the principle confined to the obligation of the guarantor. It has been clearly recognized and applied in those cases of subscription to some public enterprise, where the mutual contract of subscription is the consideration of the undertaking of each subscriber, who receives nothing directly as the result of his expenditure, and is only benefited indirectly by the accomplishment of the common purpose. Such contracts have been held to be *stricti juris* and the obligation of the respective promisors can only be enforced upon a showing of rigid compliance with the terms of their undertaking. Cincinnati, etc. R. Co. v. Bensley, 2 Cir. Ct. App. Rep. 480; State v. Emerson, 19 How. 224; Sickles v. Anderson, 63 Mich 421; Spellier Electric Time Co. v. Leedom (Pa.), 24 Atl. Rep. 197.

Cases are not wanting, however, in addition to those cited in the opinion above, which make an application of the principle closely resembling that in the principal case. In Holmes v. Small, 157 Mass. 221, defendant promised one Wright to be responsible for any lumber he might sell Mitchell until further notice. Afterwards Wright entered into partnership with the other plaintiffs, and the firm furnished more lumber Mitchell without making any further arrangements with defendant. It was held that defendant could not be made responsible for the lumber so furnished. And in a New York case where defendant guarantied to plaintiffs the repayment of certain credits to be advanced by them to de Rivera & Co., "my said guaranty to hold good until cancelled," and it appeared that after the guaranty was given a change was made in the firm of de Rivera & Co., without the knowledge of either plaintiff or defendant, the court held that, although the guaranty was a continuing one, defendant was not liable thereunder for advances made to de Rivera & Co., after the change in the firm. Birch v. de Rivera, 6 N. Y. Sup. 206.

But where there is no actual departure from the terms of the contract the fact that it is made in the name of but one member of the firm to whom it was given, that being the name under which the firm does business, will not prevent it from being available to the firm, and addition of "Esq." at the end of the partner's name cannot prevent the operation of the guaranty. Beakes v. Da Cunha, 12 N. Y. Sup. 351, 58 Hun, 609. In Nebraska the assignment, however, of a contract of guaranty is not a departure and ordinarily the assignee may maintain an action in his own name. Weir v. Anthony, 53 N. W. Rep. 206, 35 Neb. 396. So in Connecticut: Lemmon v. Strong, 59 Conn. 448. A different rule has been applied in New York. Everson v. Gere, 122 N. Y. 290, 25 N. E. Rep. 492. But see Tucker v. Blaudin, 1 N. Y. S. 842; Stillman v. Northrup, 109 N. Y. 473.

BOOK REVIEWS.

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WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Drowning.—Proof that the body of insured, whose temper and circumstances almost precluded the idea of suicide, was found in the river long after his disappearance, with no mark of violence or robbery, made a case for the jury of accidental drowning.—COUADEAU v. AMERICAN ACC. CO. OF LOUISVILLE, Ky., 25 S. W. Rep. 6.

2. ACCIDENT INSURANCE—Passengers' Risks.—Where the policy plainly limits the risk covered to that of a passenger on a common carrier's public conveyance, and there is no mistake or fraud, representations of the general agent issuing the policy that it will cover as well all accidents happening to insured while caring for and selling horses which he is taking by railroad to market transgress the agent's apparent authority, and do not bind the company.—FIDELITY & CASUALTY CO. OF NEW YORK v. TETER, Ind., 36 N. E. Rep. 283.

3. ACCIDENT INSURANCE—Violating Law.—A defense that the injury was sustained while violating the law by hunting on Sunday, contrary to a provision of the policy, need not be established beyond a reasonable doubt. A preponderance of evidence is sufficient.—NEW YORK ACC. INS. CO. OF CITY OF NEW YORK v. CLAYTON, U. S. C. C. of App., 59 Fed. Rep. 559.

4. ACTION IN FORMA PAUPERIS—Non-residents.—Rev. St. 1881, § 260, providing that any person not having sufficient means to prosecute or defend an action may sue as a pauper, applies to non-residents.—PITTSBURGH, C. C. & ST. L. RY. CO. v. JACOBS, Ind., 36 N. E. Rep. 301.

5. ADMINISTRATION — Executors — Accounting.—An appeal from a decree, not taken within a year from its entry, will be dismissed. Where an executor stated in his petition for the probate of the will that a part of the estate consisted of a sum of money in his hands, and he died without rendering an account, a finding that such sum came into his hands while acting as executor is justified.—RASKIN v. ROBARTS, Cal., 35 Pac. Rep. 763.

6. ADMINISTRATION — Powers of Administrator.—Under a will which required payment of the debts of the decedent, and the distribution in a manner designated of the balance which should remain of the proceeds of the sale of certain described real estate of the testator, without any designation of the person by whom such sale was to be made, the executor had power to sell and make conveyance of the said real estate, independently of any order of court authorizing or confirming such sale or deed.—SCHROEDER v. WILCOX, Neb., 57 N. W. Rep. 1031.

7. ADMINISTRATION—Sales by Order of Court.—Where an administrator sells land of his intestate by order of the Probate Court, a report by the administrator, a confirmation of the sale by the court, and a tender of the deed to the purchaser, are necessary, under 2 How. Ann. St. § 6044, and 3 How. Ann. St. § 6045, to render a purchaser who refuses to take title liable for a deficiency on a resale.—PEIRSON v. FISK, Mich., 57 N. W. Rep. 1080.

8. ADMIRALTY—Shipping — Bottomry.—Unlike insurance moneys, damages recovered from an offending vessel by the owner of a vessel lost in collision are a substitute for the ship, and any such recovery represents the interest of the owner in his vessel. Hence a transfer, under a bottomry bond, of all the owner's interest in the vessel, includes by necessary implication the fund recoverable for her tortious destruction.—MILLER v. O'BRIEN, U. S. D. C. (N. Y.), 59 Fed. Rep. 621.

9. ADMIRALTY—Wharfage.—Vessels which have made use of a wharf, whether under express or implied contract, are not entitled to refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property.—THE IDLEWILD, U. S. D. C. (N. Y.), 59 Fed. Rep. 628.

10. ADVERSE POSSESSION—Limitation.—Camping in a tent on vacant and unoccupied land, and cooking, preparing food, and sleeping on it for a few days, or a week, and watching it for several weeks for the purpose of keeping off trespassers and asserting title to the land, but doing and intending to do nothing else to improve the land or subject it to any proper use, is not sufficient adverse possession to interrupt the running, in favor of a tax deed, of the statute of limitations provided by section 1198 of the Revised Statutes of Wisconsin. — MUSSER-SAUNTRY LAND, LOGGING & MANUF'G CO. v. TOZIER, Minn., 57 N. W. Rep. 1072.

11. APPEAL—Affidavits to Impeach Record.—The Appellate Court will disregard affidavits filed to contradict the record of the trial court.—WILSON v. TAYLOR, Mo., 25 S. W. Rep. 199.

12. APPEAL—Final Order.—An order denying a motion for judgment on the minutes and special verdict, not followed by judgment for the adverse party, is appealable.—MURPHY v. WEIL, Wis., 57 N. W. Rep. 1112.

13. APPEAL—From Order to Probate.—How. St. § 6779, allowing an appeal to the Circuit Court by any person aggrieved, by an order of the Probate Court, does not authorize an appeal by the father of an infant, by reason of his relationship, from an order, made on ap-

plication by the infant's guardian, granting leave to lease the infant's property.—COOK V. COOK'S ESTATE, Mich., 57 N. W. Rep. 1085.

14. APPEAL—Variance.—The Appellate Court will disregard a variance between pleading and proof where the adverse party failed to show by evidence *aliunde* in the trial court that he was misled thereby to his prejudice.—RAINSFORD V. MASSENGALE, Wyo., 35 Pac. Rep. 774.

15. APPEAL FROM JUSTICE'S COURT — Pleading.—One who, in an action in justice's court, does not plead the statute of limitations, cannot do so on appeal to the district court.—PICKETT V. EDWARDS, Tex., 25 S. W. Rep. 32.

16. ARBITRATION AND AWARD.—Awards of arbitrators made in pursuance to the statute are to be liberally construed, and should not be set aside upon any grounds other than those named in the statute.—RUSSELL V. SERRY, Kan., 35 Pac. Rep. 812.

17. ASSIGNEE IN INSOLVENCY — Chattel Mortgage.—Where the assignee of a chattel mortgage of an estate has full authority to sell the goods and personal property of the estate, and to accept notes with sureties thereon in payment therefor, and such notes, or any part thereof, are not paid when due, the assignee, in the interest of the estate, has full authority to accept a chattel mortgage from the maker of the note primarily liable thereon to secure the payment of the same.—CONNOR V. HARDWICK, Kan., 35 Pac. Rep. 777.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Creditors.—A creditor may maintain an action upon the original claim against an assignor who has made an assignment for the benefit of creditors, which is still open, and recover a personal judgment against him for the amount due, notwithstanding such creditor has presented, and had allowed in full, a claim against the estate, upon which no payment has been made.—LIMBOCKER V. HIGINBOTHAM, Kan., 35 Pac. Rep. 782.

19. ASSIGNMENT FOR BENEFIT OF CREDITORS—Taxes.—An action against an assignee for the benefit of creditors to recover taxes, and to have the amount recovered declared a preferred claim against the assets, cannot be maintained, there being an adequate remedy by motion or petition in the assignment proceedings, taxes being made, by Sanb. & B. St. § 1698c, a preferred claim, which the assignee is directed, by section 1700, to pay before making a dividend, and the court, or judge thereof in vacation, being authorized by Rev. St. § 1693, to make all necessary orders for execution of the assignment.—MARATHON COUNTY V. BARNES, Wis., 57 N. W. Rep. 961.

20. ATTACHMENT.—The fact that a debtor voluntarily secures *bona fide* debts due to some of his creditors by chattel mortgages is not alone sufficient to support an attachment against his property on the ground that he has disposed of his property with the intent to hinder and delay his creditors.—MILLER V. WICHITA OVERALL & SHIRT MANUF'G CO., Kan., 35 Pac. Rep. 799.

21. ATTACHMENT—Affidavit.—Section 1 ch. 106, of the Code, among other things, prescribes that the affidavit made for the purpose of having an order of attachment shall state the nature of the plaintiff's claim, and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover: Held, the term "justly" is not superfluous, or insignificant, but is a material qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used, in order to constitute a substantial compliance with the statute.—REED V. MCCLOUD, W. Va., 18 S. E. Rep. 924.

22. ATTACHMENT—Levy.—Where an officer in whose hands an attachment is placed does not seize the property sought to be attached nor assume possession or control thereof, but merely makes a verbal agreement with the attachment debtor that the attaching creditor shall take charge of it as receiptor, and there is no apparent change of possession, the levy is invalid as against a subsequent levy of another attachment on the same property. — MAHON V. KENNEDY, Wis., 57 N. W. Rep. 1108.

23. ATTACHMENT — Pleading. — Since an interplea filed by a claimant of attached property under Mansf. Dig. §§ 356, 358, stands on the footing of any other complaint or petition, the answer of the attaching creditor thereto should be in writing, under Mansf. Dig. § 5020, requiring all pleadings to be in writing.—ROSE-WATER V. SCHWAB CLOTHING CO., Ark., 25 S. W. Rep. 73.

24. ATTACHMENTS—Priority.—The mere fact that a creditor includes in his attachment an item which, though junior to the claim of a subsequent attachment creditor, is a valid claim against the debtor, does not make the first attachment, as a whole, fail against the subsequent attachment, as in the case of a claim partly fraudulent.—SCHNEIDER V. ROE, Tex., 25 S. W. Rep 58.

25. BANKS — Misconduct of Officer in Borrowing Money.—A bank is liable for a loan obtained from another bank, dealing in good faith with its authorized officer, although such officer acts without the knowledge of the other bank officials, and appropriates the money to his own use.—CHEMICAL NAT. BANK V. ARMSTRONG, U. S. C. C. of App., 59 Fed. Rep. 872.

26. BUILDING AND LOAN ASSOCIATIONS—Construction of By-Laws.—By-laws of defendant, fixing the terms on which a borrowing member may pay up the "loan" or "advance" before the maturity of his stock, construed.—FITZGERALD V. HENNEPIN COUNTY CATHOLIC BLDG. & LOAN ASS'N., Minn., 57 N. W. Rep. 1066.

27. CARRIERS—Discrimination.—In an action against a railroad company to recover freight collected in excess of an agreed rate, error cannot be predicated on an instruction that defendant could not charge more than its "local" rate, where the "local" and the "agreed" rate were the same.—GALVESTON, H. & S. A. RY. CO. V. BOWMAN, Tex., 25 S. W. Rep. 140.

28. CARRIERS—Interstate Commerce Act—Connecting Lines.—A railroad company is not required by the interstate commerce act, § 3, cl. 2, to furnish to competing connecting carriers equal facilities for the interchange of traffic, when this involves the use of its tracks by such carriers, and it may still permit such use by one carrier to the entire exclusion of the others.—LITTLE ROCK & M. R. CO. V. ST. LOUIS, I. M. & S. RY. CO., Ark., 59 Fed. Rep. 400.

29. CARRIERS — Live Stock Limitations. — A carrier may limit its liability to its own line in a contract for a through shipment to a point on another carrier's line.—GALVESTON, H. & S. RY. CO. V. SHORT, Tex., 25 S. W. Rep. 142.

30. CARRIERS—Negligence of Connecting Lines.—In the absence of special contract, a railroad company is not liable for damages to cattle beyond its own line.—WICHITA VAL. RY. CO. V. SWENSON, Tex., 25 S. W. Rep. 47.

31. CARRIERS—Passenger—Negligence.—In an action for personal injuries received by a passenger in getting off a train, the mere fact that the train stopped only three minutes to allow passengers to alight does not show negligence on the part of company.—LOUISVILLE, N. & C. RY. CO. V. CASTELLO, Ind., 36 N. E. Rep. 299.

32. CARRIERS — Receivers—Contract for Rebates.—A receiver of a railroad company is not bound by a contract made by his predecessors for a rebate of freight charges, unless he ratifies it.—KANSAS PAC. RY. CO. V. BAYLES, Colo., 35 Pac. Rep. 744.

33. CARRIERS OF PASSENGERS—Imputed Negligence.—When a passenger on a street car is killed by a collision with a railroad train the negligence of the driver of the car will not be imputed to deceased.—LITTLE ROCK & M. R. CO. V. HARRELL, Ark., 25 S. W. Rep. 117.

34. CARRIERS OF PASSENGERS—Negligence.—A railroad company is not liable for injury to a person

thrown from a car through negligence of the trainmen, he being engaged in working his passage under an arrangement with the conductor and brakeman; they having no authority to employ assistance, and there being no custom or regulation of the company permitting the payment of fare by work on the train.—COOPER V. LAKE ERIE & W. R. CO., Ind., 36 N. E. Rep. 272.

35. CARRIERS OF PASSENGERS—Negligence.—The fact that the train on which intestate was riding was a special train of soldiers transferred from another road, and that defendant was transporting the train under a special contract to furnish the government with motive power and a train crew, did not affect plaintiff's right to recover.—GALVESTON, H. & S. A. RY. CO. V. PARSLEY, Tex., 25 S. W. Rep. 64.

36. CHATTEL MORTGAGES—Execution in Sister State.—A chattel mortgage which is valid and duly recorded where it was executed, both as between the immediate parties thereto and against third persons, will be upheld by courts of a sister State to which the property may be afterwards removed.—CRAIG V. WILLIAMS, Va., 18 S. E. Rep. 899.

37. CHATTEL MORTGAGES—Failure to File.—When the possession of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed, as required by section 14, ch. 82, Comp. St. 1893, the mortgage is absolutely void, as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage, or not.—FARMERS' & MERCHANTS' BANK OF YORK V. ANTHONY, Neb., 57 N. W. Rep. 1029.

38. CHATTEL MORTGAGES—Possession by Mortgagor.—A provision in a chattel mortgage for possession and power of sale by the mortgagor raises a conclusive presumption of fraud, and such conveyance will be held void as to creditors. — SHERWIN V. GAGHAGEN, Neb., 57 N. W. Rep. 1005.

39. CHINESE—Exclusion Acts.—A restaurant proprietor, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the tastes of his patrons is a laborer, and is not privileged to enter the United States as a merchant.—IN RE AH YOW, U. S. D. C. (Wash.), 59 Fed. Rep. 561.

40. COLLATERAL ATTACK—Records.—Plaintiffs moved to correct the record of a finding and the degree on the ground that, several days after the finding was originally made, the court, without plaintiffs' knowledge, modified it by inserting certain words in pencil in the order book, which were copied into the record; and supported the motion by affidavit. The court denied the motion, and the record contained no evidence of such alteration except such affidavit, and no finding of the court or statement of the judge that any such alteration was made: Held, to constitute a collateral attack on the record of the trial court for errors not apparent on its face, which must fail. — WILLIAMS V. FRESHOUR, Ind., 36 N. E. Rep. 280.

41. CONSTITUTIONAL LAW — Jurisdiction of Supreme Court.—Laws 1893, ch. 242, § 2, amending Rev. St. § 3070, provides that the Supreme Court shall review questions of fact and law, and "give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below." Const. art. 7, § 3, provides that, except in a few cases, the Supreme Court shall have "appellate jurisdiction only:" Held that, in so far as the act of 1893 attempts to compel the Supreme Court to decide questions of a court of original jurisdiction, it is void. — KLEIN V. VALERIUS, Wis., 57 N. W. Rep. 1112.

42. CONSTITUTIONAL LAW — Statutes — Title of Act.—Act March 9, 1891, entitled "An act fixing the salaries and prescribing the duties of certain State and county officers, and providing penalties for the violation of its provisions," which fixes the salaries of State, county, and judicial officers, their duties, and the fees to be taxed for services rendered does not violate Const. art. 4, § 19, which provides that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be included in the title.—HENDERSON V. STATE, Ind., 36 N. E. Rep. 257.

43. CONTRACTS—Affidavit of Defense.—As a person is not liable upon an unaccepted order for the payment of money, an allegation in the affidavit of defense in an action thereon that the drawer was largely indebted to defendant at the time is a sufficient defense to the order as an equitable assignment of the fund in his hands, as he is not bound therein to go into a specification of the indebtedness.—REILLY V. DALY, Pa., 28 Atl. Rep. 493.

44. CONTRACT — Subscription.—The conditions of a subscription were that a school building should be erected at P, 54 feet long, 42 feet wide, 2 stories high, and divided into two rooms. The jury found that the house was built near P, was 38 feet long, 28 feet wide, 2 stories high, and had two school rooms and a cloak room, and that it was insufficient to accommodate the pupils: Held, that the facts did not show a substantial compliance with the terms of subscription.—SULT V. WARREN SCHOOL TP., Ind., 36 N. E. Rep. 291.

45. CONVERSION — Burden of Proof—Agency.—In an action for the conversion of a certain quantity of corn, where defendant admits receiving plaintiff's corn, but avers that he purchased it from an agent of defendant, whom he paid therefor, the burden is on defendant of showing that the person from whom he purchased was defendant's agent, and that he paid such agent for the corn.—MOFFATT V. MOFFETT, Iowa, 57 N. W. Rep. 954.

46. CONVERSION. — Where the mortgagees of two chattel mortgages executed, delivered, and filed simultaneously upon the same personal property agree that the liens thereof shall be concurrent, the mortgagees become thereby tenants in common of the property so mortgaged, and may join in an action for the unlawful conversion of the same.—HAYS V. FARWELL, Kan., 35 Pac. Rep. 794.

47. CORPORATIONS—Amending Certificates of Incorporation.—The certificate of incorporation of a trading company organized under the general corporation act, together with the by-laws adopted at the time, and as a part of its organization, held, under the circumstances of this case, to constitute a contract between the stockholders; which cannot be altered by legislative authority, unless with the consent of all the stockholders, or in the manner provided in the certificate and by-laws.—LOEWENTHAL V. RUBBER RECLAIMING CO., N. J., 28 Atl. Rep. 454.

48. CORPORATIONS — Election of Directors.—Const. 1874, art. 16, § 2, gave such existing corporations as should thereafter hold their charters subject thereto the benefits of its provisions. Section 4, provided that in all elections of directors "each shareholder may cast the whole number of his votes for one candidate." Act May 20, 1891 (P. L. 101), made salaried officers of a corporation eligible to the office of a director: Held that, the fact that in 1892 a corporation, which existed prior to 1874, elected two of its salaried officers directors was not such a submission to the provisions of the constitution of 1874 as to authorize cumulative voting for directors. — COMMONWEALTH V. BUTTERWORTH, Penn., 28 Atl. Rep. 507.

49. CORPORATIONS—Liability of Stockholders.—The liability of a stockholder of a corporation against whom an execution may be issued under the provision of paragraph 1192, Gen. St. 1889, is measured by the number of shares held by him at the time the execution against the property or effects of the corporation is found to be ineffectual.—VAN DEMARK V. BARONS, Kan., 35 Pac. Rep. 798.

50. CORPORATIONS—Service of Summons.—In an action against an insurance company in any county, service of summons may be made upon the chief officer of the agency which the company may have in such county, as provided in section 14 of the Justices' Code, which provision was not repealed by the enactment of section 41, ch. 93, Laws 1871, nor by section 4, ch. 112, Laws 1875.—BURLINGTON INS. CO. V. MORTIMER, Kan., 35 Pac. Rep. 807.

51. COUNTY TREASURER—Misappropriation of Funds.—A complaint, in an action against a county treasurer for conversion of county funds, which alleges that defendant received a certain sum during his first term of office, "and did not account for or pay over to himself, as his own successor, said sum, or any part thereof," states a good cause of action.—GRAVES v. STATE, Ind., 36 N. E. Rep. 275.

52. CREDITOR'S BILL—Fraudulent Mortgage.—Where a debtor has fraudulently mortgaged chattels, a creditors' bill may be maintained therefor, the remedy at law by seizure under execution being inadequate by reason of possible embarrassment in giving the sheriff an indemnity bond, and the liability to a subsequent action by the mortgagee. — GULLICKSON v. MADSEN, Wis., 57 N. W. Rep. 965.

53. CRIMINAL APPEAL—Review.—Where the defendant pleaded not guilty to the information, without making any objection to its form, and no such objection was raised in the court below, it cannot be raised on appeal. —PEOPLE v. KELLY, Mich., 57 N. W. Rep. 1090.

54. CRIMINAL LAW—Assault.—Where a person standing about 50 feet from another fires his revolver in the direction of such other person, without any intention of shooting such person, but for the purpose of frightening or alarming him, intending thereby to create the impression that he will injure him by shooting, he is guilty of an assault. — STATE v. TRIPLETT, Kan., 35 Pac. Rep. 815.

55. CRIMINAL LAW—Assault with Intent to Rape.—A conviction of assault with intent to rape cannot be had, in the absence of evidence showing defendant's intent to enforce carnal knowledge of prosecutrix against her will.—WHITE v. STATE, Ind., 36 N. E. Rep. 274.

56. CRIMINAL LAW—Blasphemy.—An affidavit following the words of Rev. St. 1881, § 1999, to the effect that defendant, being over 14, did unlawfully and "profanely curse, swear, aver, and imprecate by and in the name of God," etc., by "unlawfully saying, 'God damned,'" is not bad for failure to aver that he said such words profanely.—TANEY v. STATE, Ind., 36 N. E. Rep. 295.

57. CRIMINAL LAW—Confession of Coconspirator.—A confession by a conspirator after the crime is accomplished binds him, but not his coconspirators.—STATE v. GREEN, S. Car., 18 S. E. Rep. 933.

58. CRIMINAL LAW — Costs. — The payment, by the county, of the costs in a case of felony, to which it cannot be a party, is voluntary, and gives it no right against the State, as for money paid to its use, since no suit can be brought against the State without its permission, and the funds in the State treasury cannot be reached by a judgment at law. — STATE v. ODOM, Tenn., 25 S. W. Rep. 105.

59. CRIMINAL LAW — Homicide — Escaped Felon. — Where an escaped felon, armed to resist arrest, with an armed ally, exchanged shots with persons whom they had just grounds to believe were in pursuit of such escaped felon, and one of them killed a member of the arresting posse, they may be convicted of murder, though they were not the first to shoot.—TOLBERT v. STATE, Miss., 14 South. Rep. 462.

60. CRIMINAL LAW—Murder—Drunkenness. — Drunkenness of defendant at the time of committing a homicide cannot be considered in determining intent as bearing on malice.—STATE v. MORGAN, S. Car., 18 S. E. Rep. 937.

61. CRIMINAL LAW—Plea in Abatement.—A conviction of a theft alleged to have been committed at the time of a burglary is not a bar to a subsequent prosecution for the burglary.—LOAKMAN v. STATE, Tex., 25 S. W. Rep. 22.

62. CRIMINAL LIBEL. — When a person intentionally and personally publishes of another what is libelous, by the general doctrine he is held to have malice in law against him, whatever the motive in fact.—STATE v. CLYNE, Kan., 35 Pac. Rep. 789.

63. CRIMINAL PRACTICE — Arson. — An information which fails to state the name of the occupant of the house, or any other facts showing its occupancy by another than defendant, is radically defective, and not curable by verdict.—STATE v. KEENA, Conn., 28 Atl. Rep. 522.

64. CRIMINAL PRACTICE—Burglary.—Where no indictment shall be deemed invalid for any surplusage when there is sufficient alleged to indicate the crime (Burns' Revision 1894, § 1825), an indictment charging burglary with intent to steal the goods, chattels, and "property" of a person named is not bad for uncertainty on the ground that "property" includes both real estate and personalty.—SIMS v. STATE, Ind., 36 N. E. Rep. 278.

65. CRIMINAL PRACTICE—False Pretenses.—An indictment charged that defendant railroad conductors and the company's timekeeper agreed that the latter should report to the company at the end of the month more trips than the conductors actually made; that the timekeeper so reported, and such conductors demanded and received more money than they were entitled to for their services; and that the company was induced to pay such sums by such false reports: Held, that the indictment was sufficient to charge defendant's with obtaining money by false pretenses.—COMMONWEALTH v. BARNETT, Ky., 25 S. W. Rep. 109.

66. DAMAGES— Conspiracy — Combinations of Merchants.— Wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise naturally to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business.—DELZ v. WINFREE, Tex., 25 S. W. Rep. 50.

67. DEATH BY WRONGFUL ACT—Deceased Bastard.—Since Rev. St. 1889, § 4478, makes bastards capable of taking and transmitting inheritance on the part of the mother, and allows her to inherit from her bastard child as if he were lawful, such mother may sue under section 4425 for the wrongful killing of her bastard child, when a minor and unmarried.— MARSHALL v. WABASH R. Co., Mo., 25 S. W. Rep. 179.

68. DEED—Condition Subsequent.—Parents conveyed land to their son, reserving to themselves a life estate, and stating in the deed that such son "is to pay the taxes on said land, and has to support the" grantors "during their natural life time, and at their death" such son "shall have possession:" Held, that the land was not conveyed to the son on a condition subsequent.—STODDARD v. WELLS, MO., 25 S. W. Rep. 201.

69. DEEDS— Consideration. — Where plaintiffs conveyed their homestead to defendant, their son, for a recited consideration, which was wholly inadequate, and the writings executed show that defendant made some agreement not reduced to writing respecting the balance of the consideration, parol evidence is admissible, in an action to cancel the conveyance, to show what the true consideration was, and the time and manner in which it was to be paid.—BECKMAN v. BECKMAN, Wis., 57 N. W. Rep. 1117.

70. DEED—Delivery in Escrow.—Where a conveyance of land is placed in the hands of a third person to be held as an escrow till payment of the purchase money, the incidents of a mortgage attach, and the grantor may proceed in equity to have a lien declared on the land, and a decree for its sale to pay the purchase money.—SUDDETH v. KNIGHT, Ala., 14 South. Rep. 475.

71. DEED—Setting Aside—Fraud.—A conveyance by plaintiff to her brother-in-law, J, through her brother-in-law R, who was appointed her attorney in fact at the suggestionof J, will be set aside for fraud and collusion, they having, with full knowledge, grossly misrepresented to her the value of the land and the state of its title, she being ignorant of the facts and trusting them, and the sale being for a small fraction, only, of the value of the land.—LEGGAT v. LEGGAT, Mont., 35 Pac. Rep. 724.

72. DEED OF LAND FOR STREET.—Where land is conveyed to a city by a deed expressly stipulating that no higher rights shall pass to the city than would have been acquired had the city procured the condemnation of the land for "street purposes only," the city cannot appropriate such land for the purpose of maintaining water-works.—ODNEAL V. CITY OF SHERMAN, Tex., 25 S. W. Rep. 57.

73. DEED OF TRUST—Sale.—Under Rev. St. § 6373, providing that a tenant may lawfully attorn to one who purchases pursuant to a sale under deed of trust, the lessee of a purchaser at a sale under a second deed of trust may lawfully attorn to a purchaser at a subsequent sale under the prior deed of trust.—FREEMAN V. MOFFIT, Mo., 25 S. W. Rep. 87.

74. DEPOSITIONS—Validity.—A commission to take depositions in another State may be issued without notice to the opposite party that application would be made therefor, as such commission is issued as a matter of right, on proper application. Rev. St. 1880, § 4435.—GLENN V. HUNT, Mo., 25 S. W. Rep. 181.

75. DIVORCE—Alimony.—The making of an order, consented to by the parties, for temporary alimony in an action for divorce, does not conclude the wife from subsequently applying for, nor the court from making, an order for further alimony.—GRANT V. GRANT, S. Dak., 57 N. W. Rep. 948.

76. DIVORCE—Alimony.—Where a husband obtains a valid decree of divorce from his wife, in another State, and no order is made with reference to alimony or a division of the property of the parties, the wife cannot, long afterwards, in an action brought in this State by her to obtain a divorce and alimony, obtain a decree for alimony alone, in the absence of any showing that the law of the State where the divorce was granted is different from that of Kansas.—ROE V. ROE, Kan., 35 Pac. Rep. 808.

77. DIVORCE—Counsel Fees.—In a divorce suit, an allowance for fees of counsel for the wife should be directed to be paid to her, not to her counsel.—PARKER V. PARKER, Miss., 14 South. Rep. 459.

78. DIVORCE—Desertion.—A husband, who does not expostulate with his wife when she informs him of her intention to separate from him, who removes a portion of the household furniture to quarters which he has rented, leaving with her another portion, to be taken by her where she sees fit, and who only once asks her to return, and never remonstrates with her for her absence, must be held to have acquiesced in the separation, and is not entitled to a divorce on the ground of obstinate desertion.—PAYNE V. PAYNE, N. J., 28 Atl. Rep. 449.

79. DRAINAGE—Assessment of Benefits.—Drainage commissioners assessed the benefit of a ditch to defendant's land thus: "All of reserve 53, except 200 acres of the N. E. side thereof, township 29, range 10, 443 acres, $4,900." Reserve 53, lay in townships 28 and 29, and defendant knew that only 150 acres of his described 443 acres lay in township 29: Held, that defendant could not have been misled by the description so as to be induced to refrain from remonstrating because her land in township 28 was not benefited.—SMITH V. STATE, Ind., 36 N. E. Rep. 298.

80. DURESS—What Constitutes.—Friends of a debtor who had obtained goods by false representations were informed that creditors in a foreign State threatened to resort to criminal proceedings if they were not secured. They informed the debtor of the threat, and advised him to assign certain claims to such creditors, which he did. Held, that such assignment was not void as being made under duress.—PHILLIPS V. HENRY, Penn., 28 Atl. Rep. 477.

81. EJECTMENT—Burden of Proof.—In an action to recover real property, the burden of proof is upon the plaintiff to establish the title which he asserts by a preponderance of the evidence.—RITTMASTER V. BRISBANE, Colo., 35 Pac. Rep. 736.

82. EJECTMENT—Judgment.—Where, in ejectment between the owners of adjoining lands, in which the division line is in dispute, the surveyor's testimony of the manner in which he located the line is absurd, in that he stated that he measured 80 chains from a corner stone in order to locate the quarter section line, though he doubtless intended to say 40 chains, a judgment for plaintiff will be reversed, as the record must be taken as it is found.—FRANKLIN V. HAYNES, Mo., 25 S. W. Rep. 223.

83. EJECTMENT—Pleading.—Where the answer of defendant in ejectment sets up legal title, on which he succeeds, the answer may contain a separate count for equitable relief in the nature of a bill of peace, and defendant may have his equities tried and determined in the action of ejectment, without resort to an independent suit in equity.—SWOPE V. WELLER, Mo., 25 S. W. Rep. 204.

84. ELECTION—Local Option—Report of Result.—Under the provision of the act that the commissioners of election shall canvass the returns of the inspectors, and ascertain and determine the result, and make a verified report of the result declared by them, it is not necessary that they shall certify that they have canvassed the returns, and that the result reported was derived from such canvass.—PUCKETT V. STATE, Miss., 14 South. Rep. 452.

85. EMINENT DOMAIN—Description of Land.—A description, in the application, report of commissioners, or judgment, of the land condemned for a pipe line by lines running certain courses and distances, "or as near said description as practicable," is insufficient.—ADAMS V. SAN ANGELO WATER-WORKS CO., Tex., 25 S. W. Rep. 165.

86. EMINENT DOMAIN—Proceedings.—Const. art. 2, § 21, providing that compensation for property taken or damaged for public use shall be ascertained by a jury or commissioners, as may be prescribed by law, and, until the same be paid, the property shall not be disturbed, is self-enforcing; and, if the legislature fail to provide for the ascertainment and payment of compensation, resort may be had to any common law action which will afford relief.—HICKMAN V. CITY OF KANSAS, Mo., 25 S. W. Rep. 225.

87. EMINENT DOMAIN—Railroad Right of Way.—Though, under Const. art. 2, § 21, a railroad right of way condemned *in invitum* is but an easement, carrying no greater dominion than needful, the Missouri fencing laws exclude the owner of the fee, with all others, from any use of the surface, unless at public crossings, or private crossings to which he may be entitled by statute or necessity.—ST. LOUIS, K. & N. W. RY. CO. V. CLARK, Mo., 25 S. W. Rep. 192.

88. EQUITY—Foreign Will.—A creditor of a foreign testator, who owned land in Wisconsin, cannot sue in equity to compel the executor to prove the will in that State, since the creditor has the same right as the executor to produce an authenticated copy of the will, and its probate in the foreign State, and to procure its allowance by the county court of the county in which testator's lands are situated, Rev. St. §§ 3790, 3793.—WELLS, FARGO & CO. V. WALSH, Wis., 75 N. W. Rep. 969.

89. EQUITY—Rescission of Contract.—A bill to rescind a contract whereby plaintiffs conveyed to defendant certain land in consideration of the transfer to them of certain chattel and real-estate mortgages, on the ground of fraudulent representations of defendant as to the title of the mortgagors to the mortgaged land, and the existence at the time of the mortgaged chattels, is not bad because it shows that the contract is wholly executed.—BAKER V. MAXWELL, Ala., 14 South. Rep. 469.

90. EQUITY—Rescission of Contract.—A party seeking to rescind a contract for fraud must tender back to the other party whatever of value he received for the property which he seeks to recover.—BALUE V. TAYLOR, Ind., 36 N. E. Rep. 269.

91. EQUITY—Rescission of Contract—Non-performance.—Equity has jurisdiction of an action to rescind a

contract for non-performance.—CITY OF GRAND HAVEN V. GRAND HAVEN WATER-WORKS, Mich., 57 N. W. Rep. 1078.

92. EQUITY—Rescission of Sale.—The mere fact of a double agency in the sale of land gives the vendor no right of rescission, when he had full knowledge that the agent was acting for the purchaser, and of all other facts, including the nature and value of the land, which were known either to the agent or the purchaser, and were necessary to intelligent action, especially when the price was the full market price of like lands at the time.—GROSS V. GEORGE W. SCOTT MANUF'G CO., U. S. C. C. (Ga.), 59 Fed. Rep. 388.

93. EQUITY—Sale of Stock.—An equitable action to cancel an executed sale of stock, and to recover it, on the ground that the buyer, by false representations, obtained it for a nominal price, will not lie where the stock has no special value to the seller apart from its money value, and where the damages can readily be ascertained.—EDELMAN V. LATSHAW, Penn., 28 Atl. Rep. 475.

94. EQUITY PRACTICE—Filing Answer.—Under Code 1887, § 3275, allowing a defendant to file his answer any time before final decree, it is error to refuse leave to defendants to file their answer 10 days after the rendition of a decree against them, but before its entry in the chancery order book, and during the same term of court, the answer tendered by such defendants showing a probable title in them to part of the land in suit. —BUFORD V. NORTH ROANOKE LAND & IMP. CO., Va., 18 S. E. Rep. 914.

95. EVIDENCE — Conclusions of Witness — Sales.—An agent who makes a contract for a corporation is competent to justify that in making such contract the corporation did not intend to enable the other contracting party to violate the law.—FRED MILLER BREWING CO. V. DE FRANCE, Iowa, 57 N. W. Rep. 959.

96. EVIDENCE — Letters.—A letter received by due course of mail from a party, in reply to a letter addressed to such party, is presumptively genuine, and admissible in evidence without further proof of the identity of the party purporting to write the reply.—ARMSTRONG V. ADVANCE THRESHER CO., S. Dak., 57 N. W. Rep. 1131.

97. EXECUTION—Exemptions.—Unless a debtor has, by express declaration or unequivocal act, relinquished the right to claim an exemption of personal property seized upon execution, he may make the claim at any time before the day of sale; and the fact that a debtor who was entitled to claim two horses only claimed one of them at the time of levy, and informed the officer that he would not claim another "at the present time," will not constitute a waiver, nor preclude him from claiming another at any time prior to the sale.—FREY V. BUTLER, Kan., 35 Pac. Rep. 782.

98. EXECUTION — Sale — Redemption.—Thomp. & S. Code, § 2136, as amended by Act 1889, ch. 83, § 2, providing that, when the purchaser of land subject to redemption resides out of the county where the land lies, the party entitled to redeem may pay the redemption money to the clerk of the Circuit Court of the county in which the land lies, to be held for the person entitled thereto, applies both to sales under execution at law and under a decree of the chancery court, and, though the sale be made under decree of the chancery court, the redemption money must be paid to the clerk of the Circuit Court.—MAUPIN V. BLANTON, Tenn., 25 S. W. Rep. 99.

99. EXECUTION SALE.—A sale, under execution, of land subject to a mortgage will not be vacated at the instance of the execution creditor for inadequacy of price, in the absence of a showing of the value of the equity of redemption.—BALDWIN V. MCGEE, Miss., 14 South. Rep. 451.

100. FEDERAL COURT—Certifying Questions.—Certification cannot be granted where no new or difficult questions of law are presented, and the mixed issues of law and fact could be reviewed satisfactorily only on examination of the entire record.—FABRE V. CUNARD STEAMSHIP CO., U. S. C. C. of App., 59 Fed. Rep. 500.

101. FEDERAL COURTS — Jurisdictional Amount.—When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed.—HORST V. MERKLEY, U. S. C. C. (Cal.), 59 Fed. Rep. 502.

102. FEDERAL COURTS — Receiverships.—A Federal Court which decrees that railroad property shall be sold on foreclosure, subject only to such claims against the receiver as shall be held valid by that court on interventions to be filed before a given date, has authority, on a subsequent intervention of the purchaser, to enforce these terms by enjoining the prosecution against him in the State Courts of damage claims arising during the receivership; and it will exercise this power when it appears that the purchaser will be subjected to a multiplicity of suits, subject to the same defenses.—CENTRAL TRUST CO. OF NEW YORK V. ST. LOUIS, A. & T. RY. CO. IN TEXAS, U. S. C. C. (Tex.), 59 Fed. Rep. 385.

103. FEDERAL OFFENSE—Obstructing and Influencing Justice.—It is not sufficient to charge an endeavor to influence and obstruct justice in a Federal Court, by means of a threatening letter, in the general language of Rev. St. § 5404.—UNITED STATES V. ARMSTRONG, U. S. C. C. (Cal.), 59 Fed. Rep. 568.

104. FEDERAL OFFENSE—Post Office — Lotteries. — A bond investment scheme, according to which only a limited few, who are determined by the order in which their applications are received, are certain to receive a return, and the rest are dependent for any return, and for the time thereof, upon the probability that the great majority will permit, their bonds to lapse, is a scheme in which the prize is dependent on chance, and constitutes a "lottery," which it is criminal to advertise through the mails. —UNITED STATES V. MACDONALD, U. S. D. C. (Ill.), 59 Fed. Rep. 563.

105. FIXTURES—Landlord and Tenant.—The right of a tenant to recover trade fixtures must ordinarily be exercised while in possession under his lease; and if he fails to do so it will be lost, unless, by some agreement with the landlord, the right of removal is preserved.—FREE V. STEWART, Neb., 57 N. W. Rep. 991.

106. FIXTURES—Rights of Vendee.—Where the owner of a building placed an engine in the basement to furnish power to tenants, fastening it by bolts embedded in a foundation of stone and cement laid in the basement floor for the purpose, the engine became part of the realty, and passed by a sale thereof, though at the time of the sale the engine was not in use, being disconnected from its boiler, which was being used with an engine furnished by one of the tenants.—TOLLES V. WINTON, Conn., 28 Atl. Rep. 542.

107. FRAUDULENT CONVEYANCES. — An insolvent debtor may prefer a creditor by conveying to him so much of his stock of goods that is reasonably sufficient to pay the debt, though his intention in making conveyance was to defeat his other creditors.—REYNOLDS V. WEINMAN, Tex., 25 S. W. Rep. 94.

108. FRAUDULENT CONVEYANCES—Creditors.—Rev. St. §§ 2077, 2078, provide that a grant to one person, when the consideration is paid by another, shall be presumed fraudulent as against the creditors of the latter, and, if a fraudulent intent be not disproved, "a trust shall result in favor of such creditors:" Held, that creditors were entitled to share equally, and one could not, by commencing a proceeding, obtain a preference.—MINER V. LANE, Wis., 57 N. W. Rep. 1105.

109. FRAUDULENT CONVEYANCES—Evidence—Instructions.—In an action for goods sold to plaintiff and seized by defendant, a sheriff, under attachment in favor of a creditor of the seller, a charge that a sale of all a man's property when he is largely in debt is evidence of fraud, when explained by a further charge

that such act is a badge of fraud; that is not fraud, but can be considered as a circumstance tending to show fraud,—is correct.—RINDSKOPF v. MEYERS, Wis., 57 N. W. Rep. 967.

110. FRAUDULENT CONVEYANCES—Husband and Wife.—A conveyance of land by a husband to his wife, in consideration of money loaned to him by her many years before, part of which she received from her father, and part of which she earned in keeping boarders, and with which he purchased the land so conveyed, is supported by a sufficient consideration as against his creditors.—FULP v. BEAVER, Ind., 36 N. E. Rep. 250.

111. FRAUDULENT CONVEYANCES—Husband and Wife.—Where a judgment is upon a claim which accrued prior to a conveyance to his wife of property belonging to the debtor husband, which property the creditors are trying to reach, the burden of proof is upon the wife to show the purchase by clear and satisfactory evidence, and that it was for a valuable consideration paid by her, or by some one in her behalf. She cannot rest her case solely upon production of a deed in which there is an expressed consideration.—MINNEAPOLIS STOCK YARDS & PACKING CO. v. HALONEN, Minn., 57 N. W. Rep. 1135.

112. FRAUDULENT CONVEYANCES — Preferences. — A conveyance of property to his wife by a member of a firm at a time when the firm is solvent is not a fraud on a creditor of the firm who extended credit to it without any assumption or knowledge that he owned the property conveyed.—NELSON v. KINNEY, Tenn., 25 S. W. Rep. 100.

113. FRAUDULENT CONVEYANCES— Preferences.—Rev. St. 1889, § 424, providing that every assignment by a debtor in trust for his creditors shall be for the benefit of all the creditors, and that provisions for preferential payments shall be void, and all debts (including judgments by confession 30 days previous to such assignment) shall be paid *pro rata* from the assets thereof, does not prevent an insolvent debtor from pledging property for the security of part of his creditors only.—JAFFRAY v. MATHEWS, Mo., 25 S. W. Rep. 187.

114. FRAUDULENT MORTGAGE— Possession.— A trust deed of its timber lands executed by a company engaged in manufacturing growing timber into lumber, is fraudulent and void as to creditors, where the instrument reserves to the company the right to prosecute its business in the usual manner.—ACME LUMBER CO. v. HOYT & BROS. CO., Miss., 14 South. Rep. 464.

115. GARNISHMENT — Exemption of Wages.— Under How. Ann. St. § 8032, which provides that the right to garnish shall not extend to $25 of the sum due the principal defendant for wages, where he is a householder, and section 8037, which expressly excepts this labor claim from the indebtedness that may be paid by the garnishee to the justice in advance of the adjudication, the garnishee acts at its peril in paying to the justice the amount due the principal defendant for wages, without disclosing whether or not defendant is a householder, or whether it knows this fact; and the householder may recover his exempt wages from the garnishee, notwithstanding such payment, unless he has acted so as to be estopped.—CRISP v. FT. WAYNE & E. RY. CO., Mich., 57 N. W. Rep. 1050.

116. GUARANTY—Construction.—Under a contract of guaranty binding the guarantors for the value of goods already sold and to be sold to one K, "not to exceed the sum of $3,000," the guarantors are not responsible after sales to that extent have been made.—ARMENGOL v. LEMP, Tex., 25 S. W. Rep. 137.

117. HIGHWAYS—Contributory Negligence.—Gen. St. § 1087, giving the right of action against the county for damages for defects in roads, as amended in 1892 by the proviso that the person injured has not himself caused the injury or negligently contributed thereto, requires the complaint to affirmatively disclaim contributory negligence.—WALKER v. CHESTER COUNTY, S. Car., 18 S. E. Rep. 936.

118. HOMESTEAD — Abandonment.—Erecting a new house on a homestead, and renting it for a few months, and until a member of the owner's family has sufficiently recovered from sickness to be moved from the old one, does not destroy the homestead character of any portion of the premises.—HENSLEY v. SHIELDS, Tex., 25 S. W. Rep. 37.

119. HUSBAND AND WIFE.—Property purchased by a wife with profits arising from keeping boarders in a house rented and supplied with necessaries by her, with her own funds, is not liable for her husband's debts.—PHILLIPS v. HALL, Penn., 28 Atl. Rep. 502.

120. HUSBAND AND WIFE—Antenuptial Agreement.—An antenuptial agreement to pay a sum certain at the promisor's death cannot be disallowed on a finding that the will gave a legacy in lieu thereof, thus postponing it to all the debts.—HITCHCOCK v. GENESEE PROBATE JUDGE, Mich., 57 N. W. Rep. 1097.

121. HUSBAND AND WIFE — Community Property.—Where a widow has conveyed communal land, and the evidence on every side goes to show that her pressing poverty required the sales, though on the other it appears that one was made for a wagon and team, the presumption that she sold to pay community debts is not overcome in favor of the husband's heirs, suing the grantees of *bona fide* purchasers 24 years thereafter.—BROWN v. ELMENDORF, Tex., 25 S. W. Rep. 145.

122. INFANTS—Disaffirmance of Contracts.—One who mortgages and conveys land, falsely representing that he is of age, and, after becoming of age, stands by for several years, knowing that the land is being conveyed to subsequent purchasers, is estopped to disaffirm his conveyance.—LACY v. PIXLER, Mo., 25 S. W. Rep. 206.

123. INJUNCTION—Contempt.—A person who has actual notice of an injunctive order violates it at his peril.—PEOPLE v. DISTRICT COURT OF EL PASO COUNTY, Colo., 35 Pac. Rep. 731.

124. INSURANCE—Conditions—Proofs of Loss.—A letter by a fire insurance company, acknowledging receipt of notice of a claim of loss by a policy holder, and stating that it "will receive prompt attention," does not waive a condition requiring the assured to furnish proofs of loss within 60 days.—KIRKMAN v. FARMERS' INS. CO., Iowa, 57 N. W. Rep. 952.

125. INTERPLEADER — When Proper.—To state a case of strict interpleader, the complainant must show that conflicting claims are made against him by two or more persons for the same thing, that he has no interest in the subject-matter of their controversy, and that the title to the thing in dispute is in some of the hostile claimants, but he cannot tell which; and all the relief he can ask is that, on the surrender of the thing in dispute, his liability shall cease, and that thereupon the hostile claimants be required to settle their dispute among themselves.—ILLINGWORTH v. ROWE, 28 N. J., Atl. Rep. 456.

126. INTOXICATING LIQUOR—Civil Damage Act.—In an action for selling liquor to plaintiff's husband when drunk, defendant cannot complain of an instruction that the jury should not find for plaintiff unless they were satisfied that defendant had good reasons for believing the husband drunk when selling him the liquor.—SOLOMON v. STATE, Miss., 14 South. Rep. 461.

127. JUDGMENT.—Where the answer in an attachment suit against a firm is withdrawn, and judgment entered by consent of some of the partners, and the property is afterwards sold on execution, with the knowledge of all, the refusal to vacate the judgment and sale, and allow the filing of an answer, on the ground that all of the partners had not consented to the judgment, is within the discretion of the court.—SMITH v. WILSON, Wis., 57 N. W. Rep. 1115.

128. JUDGMENT—Chattel Mortgage Sale—Injunction.—Judgment creditors cannot enjoin the sale of their debtor's property under void chattel mortgages in the absence of proof of levy of their executions on such property.—GLORIEUX v. SCHWARTZ, N. J., 28 Atl. Rep. 470.

129. JUDGMENT—Res Judicata.—A judgment in an action to charge a city, as the garnishee of its contractor and the assignee of the contract, for material furnished such contractor, is a bar to a subsequent action to hold the city and assignee liable for such material under the contract.—SANTLEBEN v. ALAMO CEMENT CO., Tex., 25 S. W. Rep. 148.

130. JUDGMENT AGAINST DECEASED PARTY.—A judgment for defendant in an action instituted by a guardian of three minors, rendered after such guardian and two of the wards were dead and the guardianship closed, is not absolutely void, it not appearing that either of such deceased wards was a minor at the time of his death.—BEST v. NIX, Tex., 25 S. W. Rep. 130.

131. JUSTICE OF THE PEACE—Practice.—A justice of the peace under the laws of this State has no authority to entertain or grant a motion in arrest of judgment. The jurisdiction of the justice is purely statutory; and when a verdict is rendered by a jury, if the verdict is within the jurisdiction of the justice, it is his duty to enter judgment upon it. His duty in that behalf is ministerial, not judicial; and if he assumes to set aside the verdict, or to render judgment contrary to the verdict, such proceeding may be regarded as a nullity.—CORTHELL v. MEAD, Colo., 35 Pac. Rep. 741.

132. LIBEL—Prior Publications.—A prior or contemporaneous publication in another newspaper owned by defendant is competent evidence on the question of malice, although a separate suit is pending thereon. A double recovery is to be avoided by a caution from the court that damages can be allowed only for the article sued on.—POST PUB. CO. v. HALLAM, U. S. C. C. of App., 59 Fed. Rep. 530.

133. LIMITATION — Agreement to Vacate. — The fact that land was the homestead of a man and his wife when he agreed to vacate it to those claiming it, and that his wife did not consent to the agreement, does not prevent such agreement from stopping the running of the statute of limitations. — ELDRIDGE v. PARISH, Tex., 25 S. W. Rep. 49.

134. LIMITATIONS — Fraudulent Issue of Stock. — A railroad company issued a large amount of stock and bonds, and the mortgage securing the bonds was recorded in a certain county. About the same time the county voted a tax to aid the construction of the road under Acts 20th Gen. Assem. ch. 159, which entitles the taxpayers to stock of the company to the amount of the tax paid: Held, that an action by such taxpayers to declare such stock and bonds void because issued fraudulently and without consideration, brought more than seven years after the recording of such mortgage, was barred by Code, § 2529, subd. 4, barring actions for relief on the ground of fraud "in cases heretofore solely cognizable in equity" after five years.—ALLEN v. WISCONSIN, I. & N. RY. CO., Iowa, 57 N. W. Rep. 1121.

135. LIMITATIONS — Part Payment by Grantee.—Part payment by a grantee of mortgaged land, who has assumed and agreed to pay the mortgage as part of the consideration, cannot be imputed to the mortgagor, so as to bar the running of the statute of limitations against him.—COTTRELL v. SHEPHERD, Wis., 57 N. W. Rep. 983.

136. LIMITATION OF ACTIONS — Acknowledgment. — When a creditor, in his store, reads to his debtor the items of their account, the debtor does not by failing to object to the account, acknowledge his debt, so as to interrupt the running of the statute.—ROBINSON v. MONROE, Tex., 25 S. W. Rep. 53.

137. MALICIOUS PROSECUTION—Civil Suit.—A suit for damages, wherein defendants are charged with making a fraudulent contract to defraud plaintiff, unaccompanied by attachment of property or person, or other circumstance of special damage, is no ground for an action for malicious prosecution.—TERRY v. DAVIS, N. Car., 18 S. E. Rep. 943.

138. MANDAMUS — Street-Car Companies — Trolley Wires. — A telephone company doing an established business, and having its wires strung in the streets by license of the city, may have *mandamus* to a street-car company, thereafter licensed to use electric power on the same streets, to obey an ordinance requiring it to string guard wires to its trolley wire in places where it must cross other wires, so as to prevent damage by its breakage, on a showing that relator is in special danger as to the life of its servants and the integrity of its property in case of such breakage, that breakage cannot be prevented altogether, and that guard wires are the approved and only safeguard therefor.—STATE v. JANESVILLE ST. RY. CO., Wis., 57 N. W. Rep. 970.

139. MARRIED WOMAN — Power. — Act 1891 (20 St. p. 1121), giving a married woman the same power to contract as if single, except as to suretyship and guaranty, empowers her to sign an administration bond as principal, and therefore to administer an estate.—NURNBERGER'S ESTATE v. LUDEKINS, S. Car., 18 S. E. Rep. 935.

140. MASTER AND SERVANT—Assumption of Risk.—An employee, possessed of full knowledge of the services to be performed by him and of the dangers which they involve, who voluntarily accepts the employment and continues in the service of the employer, will generally be held to have assumed the risk of the hazards of such service, and to have absolved his employer from liability for damages in case of injury. — SOUTHERN KANSAS RY. CO. v. DRAKE, Kan., 35 Pac. Rep. 825.

141. MASTER AND SERVANT—Concurrent Negligence.—Receivers operating a railroad are liable for injuries to a fireman from derailment of a train, caused by the worn condition of a rail over which the train was run by the engineer at a speed greater than that authorized by the schedule, though but for such improper speed the derailment would not have happened.—CLYDE v. RICHMOND & D. R. CO., U. S. C. C. (Ga.), 59 Fed. Rep. 394.

142. MASTER AND SERVANT—Fellow-servants.—Where a servant seeks to hold his master for injuries from the negligence of a fellow-servant, on the ground of lack of care in selecting him, an instruction putting on defendant the burden of proving proper care in the selection is improper, the presumption being that the master had performed his duty.—SOUTHERN COTTON-OIL CO. v. DE VOND, Tex., 25 S. W. Rep. 43.

143. MASTER AND SERVANT—Negligence.—In an action by a servant against his master for personal injuries, a finding by the jury that plaintiff exercised all the care usually possessed by boys of from 13 to 16 years of age, "his then apparent age," does not show his freedom from contributory negligence, in the absence of a finding that he possessed only the prudence ordinarily possessed by boys between such ages.—KELLER v. GASKILL, Ind., 36 N. E. Rep. 803.

144. MASTER AND SERVANT—Railroad Companies.—An engineer in charge of a working train with the knowledge or assent of the temporary conductor, the regular conductor being absent, has power, by ordering a brakeman to go between the cars, and place in position, by hand, a coupling link which, being bent, cannot be properly controlled with coupling sticks, to waive a rule of the company, subscribed by the brakeman at the time of his employment, requiring brakemen to use coupling sticks, and not to go between the cars.—FINLEY v. RICHMOND & D. R. CO., U. S. C. C. (N. Car.), 59 Fed. Rep. 419.

145. MEASURE OF DAMAGES—Contract.—Where plaintiffs were prevented by defendant from fully performing a contract to cut and deliver to defendant a certain quantity of logs, the measure of damages to which they were entitled was the difference between the contract price and the cost of cutting and hauling the logs.—ALLEN v. MURRAY, Wis., 57 N. W. Rep. 979.

146. MECHANIC'S LIEN.—Under the mechanic's lien law as it existed in 1888, if the consideration agreed to be paid by the owner of land to a contractor for the construction of a building on such land is insufficient to pay for all the labor and material expended thereon,

any subcontractor who has obtained a legal lien against the property is entitled to a *pro rata* share of the contract price, which lien may be enforced against the owner's property, although the owner may have paid the full amount of the contract price to the contractor or to a part of the subcontractors.—CHICAGO LUMBER CO. v. ALLEN, Kan., 35 Pac. Rep. 781.

147. MORTGAGE—Foreclosure.—In a suit to forclose a mortgage it appeared that O took from the mortgagor a part of the equity and a cash sum in exchange for land: Held, that the evidence failed to show that O assumed any of the mortgage debt as part of the purchase price for the interest in the equity.—OFFUTT v. COOPER, Ind., 36 N. E. Rep. 273.

148. MORTGAGES — Merger.—Where a mortgagor of land conveys a portion of it, a conveyance of such portion by the grantee to the mortgagee does not merge the mortgage in the fee as to the portion still remaining in the mortgagor's hands, though the mortgagor's grantee assumes payment of the mortgage, and though his deed to the mortgagee purports to convey the entire mortgaged premises.—SOUTHERN v. PEARSON, N. J., 28 Atl. Rep. 450.

149. MORTGAGES — Payment.—A principal debtor, whose debt is secured by mortgage on property owned by another person, cannot, by purchase of the obligation given to secure the payment of the debt, and causing the same to be assigned to his agent, foreclose the mortgage, and subject the mortgaged property to the payment to him of the debt. Such attempted purchase operates as a payment of the debt.—KINGSLEY v. PURDOM, Kan., 35 Pac. Rep. 811.

150. MORTGAGES—Subrogation.—The rules of subrogation applied in a case where a surety upon a note secured by mortgage on real property has paid the note, taken a deed of the land in indemnification, and the mortgage has been satisfied and discharged in ignorance of the fact that a judgment against the maker of the note and mortgage, and subordinate to the judgment lien, has thereby been promoted and advanced so as to render her interest in the property of no value.—HEISLER v. C. AULTMAN & CO., Minn., 57 N. W. Rep. 1053.

151. MORTGAGE — Subrogation.—Where a mortgagee or creditor holds security upon two properties or funds, with perfect liberty to resort to either for the payment of his debt, and another mortgagee or creditor holds a junior security upon only one of these properties or funds, equity will compel the former mortgagee or creditor to exhaust the property or fund upon which he alone has security, before coming upon the latter property or fund, and thereby depriving the latter mortgagee or creditor of all of his security.—EQUITABLE MORTG. CO. v. LOWE, Kan., 35 Pac. Rep. 829.

152. MORTGAGE—Summons—Service of Non-resident.—In an action to foreclose a mortgage as to a non-resident, whose interest in the mortgaged property is subject to the mortgage, personal service out of the State on such non-resident is sufficient, under Code Civ. Proc. § 413, which provides for service by publication on such a non-resident defendant, and that "personal service of a copy of the summons and complaint out of the State is equivalent to publication."—LA FETRA v. GLEASON, Cal., 35 Pac. Rep. 766.

153. MUNICIPAL CORPORATION—Easement in Street—Injunction.—As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of street, an easement in the street, to its full width, in front of his lot, for purposes of access, light and air, which constitutes property, therefore the maintenance and operation of a railroad on any part of the street in front of his lot so as to pollute the air, and thus depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one, he may maintain an action to enjoin it.—GUSTAFSON v. HAMM, Minn., 57 N. W. Rep. 1054.

154. MUNICIPAL CORPORATION— Ordinance.— Where a city is given power generally to pass ordinances to maintain the peace, good government, health and welfare of the city, and expressly to regulate "billiard tables" on "which games are played for amusement" (Rev. St. 1889, § 1589), it may provide by ordinance that no billiard hall shall be kept open, nor games played therein, after 9 p. m.—CITY OF TARKIO v. COOK, Mo., 25 S. W. Rep. 202.

155. MUNICIPAL INDEBTEDNESS—Constitutional Limitation.—A complaint alleged that a city had agreed to pay $5,000 for a fire-alarm system; that its indebtedness already exceeded the 2 per cent. limit fixed by Const. art. 13; that it had been compelled to borrow money to pay current expenses; that the revenue from taxes for the current year would not exceed $50,000, that of this sum, appropriations of $44,000 had been made including an item, "fire, $6,000;" and that $22,000 of the appropriations had been expended: Held, that it failed to show that there was not money in the treasury, or to be received from the taxes, out of which the $5,000 could be paid as a current expense, without becoming an indebtedness in violation of the constitutional limitation.—BRASHEAR v. CITY OF MADISON, Ind., 36 N. E. Rep. 252.

156. MUNICIPAL ORDINANCES.—It seems that where an act is not essentially criminal under the law of the State a municipal ordinance will not make it so.—CITY OF HURON v. CARTER, S. Dak., 57 N. W. Rep. 947.

157. MUNICIPAL ORDINANCES—False Imprisonment.—Ordinance permitting prisoners committed to the city prison for the violation of a by-law or ordinance of the city, necessary for the preservation of order and the welfare of society, to be employed by the city marshal at labor, either on the streets or public work of the city, or in a public or private place, being credited $1 a day on the judgment for each day's work performed, is not in conflict with section 6 of the bill of rights of the constitution of the State, or article 13 of the amendments to the constitution of the United States, prohibiting slavery and involuntary servitude.—CITY OF TOPEKA v. BOUTWELL, Kan., 35 Pac. Rep. 819.

158. NATIONAL BANKS— Stock— Married Woman.—Code N. C., § 1826, provides that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the written consent of her husband: Held, that a purchase of stock by a married woman is not a "contract" within the terms of the statute, and that the wife is liable upon an assessment although the stock was purchased without the written consent of her husband.—ROBINSON v. TURRENTINE, U. S. C. C. (N. Car.), 59 Fed. Rep. 554.

159. NEGLIGENCE.— To judicially determine a question of negligence both a court and a jury are required. While the jury is the judge of the facts viewed in the light of the law, as a rule no verdict should stand when, in the sound judgment of the trial court, it operates as a wrong between the parties which might be remedied upon a retrial.—ALT v. CHICAGO & N. W. RY. CO., S. Dak., 57 N. W. Rep. 1126.

160. NEGLIGENCE—Dangerous Premises. — When a person enters upon the premises of another by invitation, either express or implied, or simply by permission,—license,—the law imposes upon the latter the duty of exercising ordinary care.—EMERY v. MINNEAPOLIS INDUSTRIAL EXPOSITION, Minn., 57 N. W. Rep. 1132.

161. NEGOTIABLE INSTRUMENTS—Assignment.—Where one of two joint makers of a note pays the holder the amount then due, the note is satisfied, though the transaction is in the form of a purchase, and the note is assigned to the payor.— SWEM v. NEWELL, Colo., 35 Pac. Rep. 734.

162. NEGOTIABLE INSTRUMENTS — Consideration. — A promissory note, given for the privilege of using or selling an article which all men are equally at liberty to lawfully use and sell, lacks consideration to sup-

port it.—SCHRODER v. NEILSON, Neb., 57 N. W. Rep. 998.

163. NEGOTIABLE INSTRUMENT — Pleading. — When plaintiff sues defendant as indorser, but proves him liable as a guarantor, without objection, the judgment will not be reversed, though plaintiff did not sustain the burden on him under the pleadings to show notice and protest.—HOLMES v. PRESTON, Miss., 14 South. Rep. 455.

164. NEW TRIAL—Issues Triable.—All issues are retriable on a new trial granted without limitation.—FRITTS v. NEW YORK & N. E. R. Co., Conn., 28 Atl. Rep. 529.

165. OFFICE AND OFFICERS—Governor—State Officer. —The governor has no power, without notice and a hearing, to remove arbitrarily or capriciously a member of the board of trustees of the charitable institutions of the State after confirmation by the State senate, as the tenure of office of such trustees is declared by law to be three years. Section 2, art. 15, State Const. section 2, ch. 130, Sess. Laws 1875.—LEASE v. FREEBORN, Kan., 35 Pac. Rep. 817.

166. PARENT AND CHILD—Loss of Service.—The right of action of a father for an injury to his minor child is based on the parental relation, nor that of master and servant, and he is entitled to be idemnified for his expenses in the care and cure of the child, and for loss of services past and prospective.—NETHERLAND AMERICAN STEAM NAV. CO. v. HOLLANDER, U. S. C. C. of App., 59 Fed. Rep. 417.

167. PARTNERSHIP.—A contract under which defendant is to furnish a house for carrying on a shooting gallery, and plaintiff to fit it up and furnish the necessary inplements, and to personally conduct the business, net profits to be equally divided between them, and the business to continue as long as it is profitable, does not make them partners *inter sese*.—PULLIAM v. SCHIMPF, Ala., 14 South. Rep. 488.

168. PARTNERSHIP—Accounting—Trusts.—Where the surviving partner of a firm has conveyed to "C, administrator" of the deceased partner, all the assets of the firm, for the purpose of paying first the firm debts and then the debts of the deceased partner, and "to legally account for all such moneys as may come into his hands by virtue of this assignment," he may properly bring suit against said C individually for an accounting as to the property so conveyed.—WEISEL v. COBB, N. Car., 18 S. E. Rep. 943.

169. PARTNERSHIP— Agreement.—An agreement setting out that B has employed S as clerk to superintend his store as long as B chooses; that S shall have half the net profits, and is a half owner of all the goods, moneys, accounts, notes, etc., belonging to the store, —constitutes B and S partners; and S, as survivor, can recover the store's bank balance.—SAWYER v. FIRST NAT. BANK OF ELIZABETH CITY, N. Car., 18 S. E. Rep. 949.

170. PARTNERSHIP—Liability on Note.—A firm is liable on a note, signed by one partner in his individual name, for money to be used for the benefit of the firm, and at the request and consent of the other partner.—NATIONAL EXCH. BANK OF LEXINGTON v. WILGUS' EX'RS., Ky., 25 S. W. Rep. 2.

171. PARTNERSHIP—Limited Partnership.—Under Act June 21, 1874 (P. L. 271), as supplemented by Act May 1, 1876 (P. L. 89), permitting subscriptions to the capital stock of a limited partnership to be in "real or personal estate, mines or other property," contributions to the capital cannot be made in personal property of a company, subject to its indebtedness.—HASLET v. KENT, Pa., 28 Atl. Rep. 501.

172. PARTNERSHIP—Power of Partner.—The provision in a partnership agreement between R, G, and others, which appointed R manager, that R should apply the proceeds of the business, *inter alia*, to payment of pre-existing debts of G, does not authorize him to bind the firm by a note in payment of a claim against G.—WHITLA v. BUTLER'S ESTATE, Mich., 57 N. W. Rep. 1082

173. PAWNBROKERS—"Receiving" Unlawful Interest.—Under Gen. St. §§ 3003, 3005, prohibiting a pawnbroker from receiving more than 25 per cent. per annum for loans on chattels, and providing a penalty for violating such provision, a pawnbroker is not liable unless he has actually received the unlawful interest.—HALLENBECK v. GETZ, Conn., 28 Atl. Rep. 519.

174. PLEADING—Conclusions of Law.—In an action on an administrator's bond, a plea "that since the final account and settlement of said estate, and the institution of this suit, the time elapsed is sufficient in law to bar a recovery against these defendants," and they plead "the statute of limitations in bar of plaintiffs' recovery," is bad, as containing but an allegation of law. —LASSITER v. RAPER, N. Car., 18 S. E. Rep. 946.

175. PLEADING—Demurrer to Evidence.—A demurrer to plaintiff's evidence is an admission of its truth, together with such reasonable inferences as can be drawn therefrom, and it is a submission to the court of the question of its sufficiency—GALVESTON H. & S. A. RY. CO. v. TEMPLETON, Tex., 25 S. W. Rep. 135.

175. PLEDGE—Assignment.—An assignment of his interest in a mortgage and notes pledged as security for a loan, by the executor of the pledgee, is valid, and not a fraud on the pledgor, though payment is not first demanded of the pledgor, nor notice given him that such assignment is to be made, as it does not affect his position or right to redeem.—DRAKE v. CLOONAN, Mich., 57 N. W. Rep. 1098.

177. PRINCIPAL AND AGENT—Authority—Ratification. —An agent of a non-resident corporation, having general charge of its local business in a Kansas town, has no implied authority to collect debts due his principal by a contract for his own personal board; and a person owing such principal a debt, who furnishes the agent board under an agreement that such agent shall give him credit for the amount thereof on the principal's debt, does so at his own risk.—ST. JOHN & MARSH CO. v. CORNWELL, Kan., 35 Pac. Rep. 785.

178. PROBATE JURISDICTION — Limitations.—Under How. St. § 6332, which authorizes a guardian to ask a probate judge to pass on a question whether a debt of the ward should be paid, the Probate Court has jurisdiction to pass on a claim by the State against the guardian of an insane person for his expenses at an asylum, where the guardian has stipulated that the claim should be heard before such court.—STATE v. DUNBAR'S ESTATE, Mich., 57 N. W. Rep. 1103.

179. PROHIBITION — Title of De Facto Officer.—Prohibition will not issue, on relation of one sued before the appointee of a city council, to fill a vacancy as justice of the peace, on the ground that the council had no power to appoint; since, the office existing *de jure*, the appointee is a *de facto* officer.—IN RE RADL, Wis., 57 N. W. Rep. 1105.

180. QUIETING TITLE—Laches.—A delay of six years, after acquiring an undivided interest in land, before asserting title, is not such laches as to bar an action against the cotenant to quiet title, where each has paid taxes part of the time, the land most of the time has been open to the public, and defendant, though controlling the land in the absence of plaintiff, has not made such adverse claim as to set in operation the statute of limitations, and has been more than compensated for expenses in improvements by what he has taken off the land.—CITIZENS' SAV. BANK OF ST. LOUIS v. STEWART, Iowa, 57 N. W. Rep. 967.

181. QUIETING TITLE—Pleadings.—In an action having for its object the declaration of a trust in land in favor of the plaintiff, and the quieting of title in him, it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and, if he fail to do so, the nature of defendant's title, or the existence of any title in defendant, is immaterial.—BLODGETT v. MCMURTRY, Neb., 57 N. W. Rep. 985.

182. RAILROAD COMPANY — Crossing — Evidence.—A witness at work three-quarters of a mile from the crossing, who testifies that he heard the whistle every day previously, and that on the day of the accident the wind was blowing in his direction from the cr...

ing, may testify that no signals, which he heard, were given on the day of the accident.—SANBORNE V. DETROIT, B. C. & A. R. CO., Mich., 57 N. W. Rep. 1047.

183. RAILROAD COMPANIES—Negligence of Postal Clerk.—While a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice, of which it has notice, which is liable to cause injury to passengers and others lawfully on its premises; and, if the practice is one from which such injury might be reasonably anticipated, it is not necessary, in order to charge the company with this duty, that on some former occasion a like injury had occurred.—GALLOWAY V. CHICAGO, M. & ST. P. RY. CO., Minn., 57 N. W. Rep. 1058.

184. RAILROAD COMPANY—Obstruction of Street.—An abutting lot owner within an incorporated city of the second class has a right to have the street adjoining his property maintained as a street, so that access to his lot may not be entirely cut off or destroyed.—ATCHISON, T. & S. F. R. CO. V. DAVIDSON, Kan., 35 Pac. Rep. 787.

185. RAILROAD COMPANY — Obstructions of Street.—Plaintiffs owned lots fronting on W avenue 150 feet from F street. Defendants lawfully constructed their railroad along F street, crossing W avenue. Under direction of the city authorities defendants graded W avenue in front of plaintiff's premises, as directed by the city engineer: Held, that defendants are not liable to plaintiffs for injuries to their property, caused by such grading.—ATCHISON, T. & S. F. R. R. CO. V. ARNOLD, Kan., 35 Pac. Rep. 780.

186. RAILROAD COMPANIES — Stock — Fence. — Under Code 1887, § 1258, requiring a railroad company to fence its right of way along inclosed lands, and section 1261, providing that, in any action against a railroad company for stock killed on its track at a place which was not fenced as required, it should not be necessary to prove negligence on the part of the company, a railroad company cannot show that there was a legal fence at the point in question erected by the land-owner, and that, therefore, it was under no obligation to erect a fence there.—NORFOLK & W. R. CO. V. MCGAVOCK'S ADM'RS., Va., 18 S. E. Rep. 909.

187. RAILROAD COMPANIES—Taxation.—Rev. St. 1889, § 7725, provides that the board of equalization shall apportion the aggregate value of all property belonging to a railroad within the State to each county according to the ratio which the number of miles of road completed in such county shall bear to the whole length of the road in the State: Held, that in determining the length of a road for the purposes of apportionment only the length of its main track is to be considered.—STATE V. STONE, Mo., 25 S. W. Rep. 211.

188. RAILROAD CROSSINGS — Animals — Injury. — A railroad company owes ordinary care to prevent injury to an animal on a highway crossing without the owner's fault, though unattended, such animal not being a trespasser on the track.—LOUISVILLE, N. A. & C. RY. CO. V. OUSLER, Ind., 36 N. E. Rep. 290.

189. REAL ESTATE AGENTS—Commissions.—An agreement by real estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which such principal agreed to pay.—SCOTT V. LLOYD, Colo., 35 Pac. Rep. 733.

190. REAL ESTATE AGENTS—Compensation.—A complaint alleging a contract of employment, the rendering of services and expenditure of moneys in performance thereof, plaintiff's wrongful discharge by defendant, and the value of his services and expenditures, and praying judgment therefor, less receipts, is on a *quantum meruit*, and not for damages for breach of contract.—GLOVER V. HENDERSON, Mo., 25 S. W. Rep. 175.

191. RECEIVERS—Suits in Other Courts.—The permission given by the third section of the judiciary act of 1887-88 to sue receivers of Federal Courts for acts or transactions of theirs in carrying on the business connected with the property, without leave of the appointing court, is not restricted to the courts having jurisdiction of the receiver and the property, or to the Federal Courts generally, but extends to any court of competent jurisdiction, and the appointing court has no power to enjoin the bringing of such suits in any other than the Federal Courts.—CENTRAL TRUST CO. OF NEW YORK V. EAST TENNESSEE, V. & G. RY. CO., U. S. C. C. (Ky.), 59 Fed. Rep. 523.

192. RELEASE AND DISCHARGE—Bar.—In an action at law in a Federal Court evidence is not admissible to show that a release, which, on its face, constitutes a complete bar to the action, was given under a mistake of fact, such as, in equity, would require its rescission or cancellation.—MESSINGER V. NEW ENGLAND MUT. LIFE INS. CO., U. S. C. C. (Penn.), 59 Fed. Rep. 529.

193. REMOVAL—Citizenship of Corporation.—Act Ga. 1853, which authorized a railroad company incorporated in Alabama to extend its road into Georgia, and made it subject to suit in Georgia by citizens of that State, did not deprive the company of the right to remove such a suit to a United States court.—CHAPMAN V. ALABAMA G. S. R. CO., U. S. C. C. (Ga.), 59 Fed. Rep. 370.

194. REMOVAL—Time of Filing Petition.—It is sufficient excuse for not filing the petition in the Federal Court on the day regularly set for the beginning of the first term after the petition and bond were filed in the State court, being November 5th, that defendant's attorney inquired of the clerk when the term would begin, and was told that the first day would be December 5th; it appearing that, owing to the absence of the judge, no court was held until that date.—BURGUNDER V. BROWNE, U. S. C. C. (Wash.), 59 Fed. Rep. 497.

195. REMOVAL OF CAUSES—Remand — Amended Petition.—When a cause is remanded for defects in the petition after the time when an answer is required by the State practice it is then too late to again remove it on an amended petition.—FRISBIE V. CHESAPEAKE & O. RY. CO., U. S. C. C. (Ky.), 59 Fed. Rep. 369.

196. REPLEVIN—Tenant in Common of Grain.—A cropper cultivating land under an agreement to divide the crop with his landlord is entitled to the possession of all the crop; and where, on division, the landlord by mistake receives more than his share, the tenant may replevy the excess.—FREESE V. ARNOLD, Mich., 57 N. W. Rep. 1038.

197. RES JUDICATA—Splitting of Actions.—Where a creditor splits up a running account which constitutes a single cause of action, and recovers upon a part of the same, such adjudication constitutes a complete bar to a recovery on the remaining portion of the account.—BOLEN COAL CO. V. WHITTAKER BRICK CO., Kan., 35 Pac. Rep. 810.

198. SALE—Conditional Sale.—Pub. Acts 1893, ch. 147, providing that a contract for the sale of personal property, which is conditioned that the title shall remain in the vendor after delivery, shall unless acknowledged and recorded, be held to be an absolute sale, "except against the vendor and his heirs," does not prevent the vendor under such a contract of sale, though it is not recorded, from replevying the goods sold from one who purchased them from the original vendee without knowing that the title had not passed to the latter.—LEE BROS. FURNITURE CO. V. CRAM, Conn., 28 Atl. Rep. 540.

199. SALE—Contract.—When one person, by letter to another, states that he has a few jars, and offers to sell him some, without mentioning any particular quantity, a telegram from the latter ordering a certain quantity does not, until the order is accepted by the former, create a contract to deliver binding on him.—ALLEN V. KIRWAN, Penn., 28 Atl. Rep. 495.

200. SALE — Growing Crops.—A crop of corn was planted and grown upon mortgaged land by the mortgagor. In accordance with a judgment of foreclosure, the land was sold without reservation on the last day

of September. Four days before the sale of the land, the mortgagor sold the crop of corn to another. The corn was then mature, but there had been no physical severance of the same from the land at the time of the judicial sale. Held, that the vendee of the mortgagor was entitled to the crop, and that the same did not pass with the soil to the purchaser of the land.—FIRST NAT. BANK OF CLAY CENTER V. BEEGLE, Kan., 35 Pac. Rep. 814.

201. SALE—Possession.—Though possession of goods sold is retained by the seller, the sale, which is valid except as to creditors of the seller, can be attached by them only by a legal attachment or legal levy of execution, followed by proceedings to appropriate the avails thereof to payment of their debts. — PRICE V. HEUBLER, Conn., 28 Atl. Rep. 524.

202. SALE—Warranty.—Under the Code of this State the seller of personal property does not, except as therein specifically provided, impliedly warrant the quality of the thing sold. — MCCORMICK HARVESTING MACH. CO. V. WATSON, S. Dak., 57 N. W. Rep. 945.

203. SCHOOLS—Appointment of Teachers.—Under section 13, ch. 45, of the Code as it stood in the edition of 1897, school trustees had no power, as individuals, to appoint teachers. Such trustees could only appoint at a meeting of which all the trustees had notice, and at least two of the trustees must concur in the appointment. The appointment must be in writing. — CASTO V. BOARD OF EDUCATION OF RIPLEY DIST., W. Va., 18 S. E. Rep. 923.

204. SCHOOL LANDS—Control by Legislature. — Under Const. art. 10, § 2, providing that the proceeds of all school lands shall be used for the support of schools, the legislature has no power to set apart any of these lands for a State park.—STATE V. CUNNINGHAM, Wis., 57 N. W. Rep. 1119.

205. SET OFF AND COUNTERCLAIM.—The amount paid by defendant to third persons for articles furnished by them to plaintiff, to be used by him in the construction of machinery for defendant, cannot be set off against the price of the machinery, unless plaintiff requested defendant to pay for them. — COLLINS V. RICHMOND STOVE CO., Conn., 28 Atl. Rep. 534.

206. SPECIFIC PERFORMANCE.—A party to a land contract containing a condition that such party should pay one-half the cost of a survey does not forfeit his rights under the contract by a refusal to pay as costs a sum greater than half thereof. — DAVIS V. TERRY, N. Car., 18 S. E. Rep. 947.

207. SPECIFIC PERFORMANCE. — Where a vendor of land declines for over a year, without sufficient reason, to carry out his contract, he cannot, at the end of that time, after prices have fallen, ask for specific performance thereof.—RISON V. NEWBERRY, Va., 18 S. E. Rep. 916.

208. SPECIFIC PERFORMANCE — Mining Lease. — A decree of the Supreme Court, directing specific performance of a contract to lease defendant's mining properties, which described them by the names of the lodes, and as "consisting of 26.8 acres," is not satisfied by a subsequent decree, on remand to the lower court, ordering the making of a lease of defendant's properties "as owned by them" at the date of the contract to lease, without stating the quantity of land.—COCHRANE V. JUSTICE MIN. CO., Colo., 35 Pac. Rep. 752.

209. SPECIFIC PERFORMANCE—Oral Contract.—Specific performance and accounting as to the profits of land cannot be granted where there was never an understanding as to the sale of the land amounting to a contract.—STEVER V. TORRENT, Mich., 57 N. W. Rep. 1087.

210. TAXATION—Assessment.—On appeal from an assessment of plaintiff's land, evidence is admissible to show that the city in which it lay had adopted the rule of assessing land at only one-half its value, though Gen. St. § 3831, provides that all property shall be assessed at its full value; plaintiff contending that the rule adopted was violated in his case. — RANDELL V. CITY OF BRIDGEPORT, Conn., 28 Atl. Rep. 523.

211. TAXATION—Capital Stock of Corporations.—Since one sum of money cannot serve as capital for two companies, and the capital of domestic corporations must be certified to the State, a domestic insurance company is estopped to assert that part of its capital stock is not taxable because "invested in property which is otherwise taxed as property" (Code 1886, § 453, subd. 9), viz. in the capital stock of a State bank.—COMMERCIAL FIRE INS. CO. V. BOARD OF REVENUE OF MONTGOMERY COUNTY, Ala., 14 South. Rep. 490.

212. TAXATION—Manufacturing Corporations—License Tax. — Where a manufacturing corporation opens a store, it becomes a dealer in goods, wares, and merchandise, within the meaning of the acts providing for mercantile licenses.—COMMONWEALTH V. THOMAS POTTER, SONS & CO., Penn., 28 Atl. Rep. 492.

213. TAXATION—Sale of Land.—In an action for possession of land sold, as defendant's property, for taxes and purchased for the State, a complaint which does not allege that there was no personal property which could be distrained is demurrable, as the statute makes it a condition of a valid sale of land for taxes that there be no personal property which can be distrained.—COMMONWEALTH V. THREE FORKS COAL CO., Ky., 25 S. W. Rep. 3.

214. TAX DEED — Validity.—A sheriff's deed, made pursuant to a sale under an execution issued on a judgment in an action against a person who was dead at its institution to enforce the State's lien for delinquent taxes, conveys no title.—CHILDERS V. SCHANTZ, Mo., 25 S. W. Rep. 209.

215. TAX SALES—Redemption.—Though Const. 1890, § 79, preserves the right of redemption from tax sales of realty for not less than two years, section 274, providing that the laws in force, and repugnant to the constitution, should remain till April 1, 1892, unless sooner repealed, continued, till that date, the existing revenue law, which gave one year's right of redemption; and in the case of a sale made prior to April 1, 1892, the parties' rights were governed by that law, under Code 1892, § 4, providing that its repealing clauses do not affect any act already done, or cause of action or right accruing or accrued.—JUDAH V. BROTHERS, Miss., 14 South. Rep. 455.

216. TELEGRAPH COMPANY—Notice of Office Hours.—A telegraph company owes no duty to give the sender of a dispatch notice of the office hours at the receiving office if they are established and reasonable; and in the absence of a special contract to send and deliver at once, and of notice to the sender of the regulation and office hours of the receiving office, it is not the company's duty to deliver before such office hours.—WESTERN UNION TEL. CO. V. NEEL, Tex., 25 S. W. Rep. 15.

217. TELEGRAPH COMPANIES — Statutory Penalty.—Code 1892, § 4826, which imposes a penalty on telegraph companies for failure to "transmit correctly," requires substantial accuracy in transmission, but not an exact reproduction of the message as written by the sender.—WESTERN UNION TEL. CO. V. CLARKE, Miss., 14 South. Rep. 452.

218. TRESPASS — Injunction.—Injunction will not lie in favor of a complainant out of possession to restrain the removal of stone from land of which defendants had possession under a claim of ownership when complainant obtained title thereto from the government, where the disputed question of title has not been adjudicated.—KELLAR V. BULLINGTON, Ala., 14 South. Rep. 466.

219. TRESPASS TO TRY TITLE.—Where, in trespass to try title, the issue is really one of boundary, and the jury finds for plaintiff, a motion in arrest of judgment will not lie in favor of defendant because of insufficiency of the description in the petition of the land sought to be recovered.—HALSELL V. BELCHER, Tex., 25 S. W. Rep. 156.

220. TRESPASS TO TRY TITLE.—In trespass to try title by the heirs of a wife against persons holding under a

title taker in the husband's name during the marriage, to recover the land as having been partly paid for by the separate estate of the wife, the burden is on plaintiffs to show the extent to which her estate was so used.—TOMPKINS v. WILLIAMS, Tex., 25 S. W. Rep. 158.

221. TRUSTS—Absolute Assignment.—A contract by which a party assigns absolutely to an intimate confidential friend and adviser a sum of money equal to his whole interest in certain pending litigation, and charges the same on the fund to be recovered, will be held to be upon a secret trust in his own favor, when it is admitted that he would so testify if still alive, and it appears that the assignee's subsequent conduct and expressions assumed the existence of a joint interest, and that the services constituting the recited consideration for the assignment had apparently been compensated by previous payments and by a monthly salary.—DE CHAMBRUN v. SCHERMERHORN, U. S. C. C. (N. Y.), 59 Fed. Rep. 504.

222. TRUSTS — Enforcement.—Where a trustee purchases land with the trust fund, and wrongfully causes title to be conveyed to another in payment of an antecedent debt, though the grantee is innocent of the wrong, his title is subordinate to the equitable title of the beneficiary.—ORB v. COAPSTICK, Ind., 36 N. E. Rep. 280.

223. TRUSTS — Resulting Trusts.—Under How. St. § 5569, providing that no trust shall result in favor of the person paying the consideration for land who has the title conveyed to another, where a partner causes the title to land purchased by the firm to be conveyed to his wife and copartner, he cannot claim his partnership interest against his wife's estate as a resulting trust in his favor.—WINANS v. WINANS' ESTATE, Mich., 57 N. W. Rep. 1088.

224. TRUSTS—Stock in Church Corporation.—B and another, members of a church society, advanced money to build a church, and took mortgages on the property. After the church was completed, they agreed with the society that if other debts were paid they would donate the amount due them. The society then incorporated, and B and such other each subscribed to the stock to the amount due him. Afterwards such corporation, by an agreement with the rector, wardens, and vestry of such church, also incorporated, turned over all its property to the latter for the free use of the parish, and it was so used until the building and personal property were destroyed by fire. After the fire such corporation sold its property, and distributed its assets among the stockholders. The amount due B was retained by the treasurer because of diverse claims thereto: Held, that the stock issued to B was his individual property, and was not held in trust for the rector, wardens, and vestry.—ST. GEORGE'S CHURCH SOC. v. BRANCH, Mo., 25 S. W. Rep. 218.

225. VENDOR AND PURCHASER—Rescission.—The vendor of land placed the deed in escrow under a condition that, in case of the vendee's default in making payments, the sums paid should be forfeited, and the deed delivered to the vendor. The vendee defaulted, and the vendor obtained the deed: Held that, where the vendee recovered judgment in an action for the purchase money paid, she was not entitled to a lien on the land, under Civ. Code, § 3050, which provides that one who pays to the owner any part of the price of land, under a contract of sale, has a special lien on it, independent of possession, for such part as he may be entitled to recover back "in case of failure of consideration.—MERRILL v. MERRILL, Cal., 35 Pac. Rep. 768.

226. VENDOR'S LIEN—Foreclosure.—When a note acknowledges a vendor's lien, and stipulates that in case of legal proceedings on the note the payor will pay an attorney's fee, the judgment on the note and foreclosing the lien properly makes the attorney's fee a part of the lien.—TINSLEY v. MOORE, Tex., 25 S. W. Rep. 148.

227. VENDOR'S LIEN NOTE—Assignment.—Where the holder of a vendor's lien note failed to present it within the year after the grant of letters on the estate of the deceased vendee, the question whether the lien was lost, or was postponed till after the widow's allowance, and claims presented and allowed in time were paid, is to be determined primarily by the probate court.—MOORE v. GLASS, Tex., 25 S. W. Rep. 128.

228. WATERS AND WATER COURSES—Title by Prescription.—Where defendant and its predecessors in title diverted the waters of a stream on which plaintiff's land bordered, at a point thereon above plaintiff's land, and for more than five years prior to plaintiff's action to restrain its diversion used the same openly, and adversely to plaintiff and all others, it must be deemed to have acquired a prescriptive right to continue the diversion complained of. — GALLAGHER v. MONTECITO VAL. WATER CO., Cal., 35 Pac. Rep. 770.

229. WILLS— Bequest. — Testator, who left seven grandchildren, two being the children of two of his sons, and five the children of a deceased daughter, after giving certain legacies, gave "the remnants of said estate to be divided *pro rata* among the heirs:" Held, that they took *per stirpes*, and not *per capita*.—CONKLIN v. DAVIS, Conn., 28 Atl. Rep. 537.

230. WILLS—Contents as Evidence of Capacity.—The contents of a will may be considered on the questions of undue influence and of testator's mental capacity.—APPEAL OF CRANDALL, Conn., 28 Atl. Rep. 531.

231. WILLS—Description of Devisees.—Testator's will reserved to his wife and daughter, as could be agreed with his son, property now occupied by "my son and family," the premises to be kept in regular repair and taxes paid by the son, and, when no longer occupied by any member of "my family," to be sold, and the proceeds divided among "my heirs:" Held that, by the expression "my family," testator did not intend to include his son, but his wife and daughter only.—WOOD v. WOOD, Conn., 28 Atl. Rep. 520.

232. WILLS—Description of Property.—Testatrix's direction to her executor to sell her house and lot in N, and out of the proceeds pay certain legacies, empowers him, in the light of evidence that she owned no realty except a house and lot in B, a suburb of N, to sell and make title to the B property.—HAWKINS v. YOUNG, N. J., 28 Atl. Rep. 511.

233. WILL—Legacy as a Charge.—If legacies be given generally, and the residue of the real and personal estate be afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate.—FIRST BAPTIST CHURCH OF HOBOKEN v. SYMS, N. J., 28 Atl. Rep. 461.

234. WILLS—Nature of Estate.—A wife does not take absolutely under a will giving her all of testator's estate for life, with power to dispose of the profits and any of the goods and chattels, where a further clause directed the payment of a certain amount to a son after the expiration of the life estate, and pointed out the sources of payment.—BRADY v. BRADY, Md., 28 Atl. Rep. 515.

235. WILL—Powers.—A mere power of sale under a will does not work a conversion of realty into personalty until exercised.—DARLINGTON v. DARLINGTON, Penn., 28 Atl. Rep. 503.

236. WILLS—Undue Influence.—Under the statute requiring the court to frame and submit to the jury the issue *devisavit vel non*, the petition need not directly allege that testatrix was of unsound mind, in order to a trial of that question.—CARL v. GABEL, Mo., 25 S. W. Rep. 214.

237. WILL—Vesting of Future Estate.—A provision, "I loan to my wife, E, during her natural life," all my residuary estate, "and my wish is that the property I have loaned to her after her death" be sold, and the proceeds "equally divided among my four children," or "their lawful heirs begotten of their bodies," the gift to the children vests immediately, so that an assignment by one during the widow's life is valid.—CHAPMAN v. CHAPMAN, Va., 18 S. E. Rep. 913.

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